S. Hrg. 98-1094

THE LOCAL GOVERNMENT ANTITRUST ACT OF 1983

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

S. 1578

A BILL TO CLARIFY THE APPLICATION OF THE FEDERAL ANTITRUST LAWS TO LOCAL GOVERNMENTS

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CONTENTS

OPENING STATEMENT

Page

Thurmond, Hon. Strom (chairman) ... 1

PROPOSED LEGISLATION

Text of S. 1578—A bill to clarify the application of the Federal antitrust laws to local governments ... 3

CHRONOLOGICAL LIST OF WITNESSES

Durenberger, Hon. Dave, a U.S. Senator from the State of Minnesota ... 5

McGrath, Hon. J. Paul, Assistant Attorney General, Antitrust Division, U.S. Department of Justice ... 9

Panel consisting of Hon. Joseph Riley, mayor, Charleston, SC, on behalf of the National League of Cities; Hon. James C. Leventis, chairman, Richland County Council, Richland County, SC, on behalf of the National Association of Counties; and Hon. William J. Althaus, mayor, York, PA, on behalf of the U.S. Conference of Mayors ... 23

Handler, Milton, law firm of Kaye, Scholer, Fierman, Hays & Handler, New York, NY ... 69

Panel consisting of Carlos Smith, Esq., Chattanooga, TN, on behalf of the American Public Power Association; Michael Lovendusky, Esq., director of governmental relations, American Ambulance Association, Washington, DC; and Stewart C. Eggert, Esq., Hillsborough County Aviation Authority, Tampa, FL, on behalf of the Airport Operators Council International ... 89

ALPHABETICAL LISTING AND MATERIALS SUBMITTED

Althaus, William J.:
  Testimony ... 58
  Prepared statement ... 61
Durenberger, Senator Dave: Testimony ... 5
Eggert, Stewart C.:
  Testimony ... 125
  Prepared statement ... 128
  Airport Operators Council International Roster of Members ... 137
  Largest U.S. publicly owned airports with airport of port authority structure that receive scheduled airline service ... 140
  Draft bill ... 142
Handler, Milton:
  Testimony ... 69
  Draft bill ... 74
  Memorandum ... 78
Leventis, James C.:
  Testimony ... 40
  Prepared statement ... 45
Lovendusky, Michael:
  Testimony ... 106
  Prepared statement ... 108
  Assembly bill No. 3153, California legislature, 1983-84 session, February 15, 1984, introduced by Member Bronzan ... 112
  "Federal Laws Can Make Good Neighbors," by Michael Lovendusky, the Washington Corner, AID, April 1984 ... 114

Lovendusky, Michael—Continued
Page
  "Emergency Calls—Red Tape Nightmare," transcript of ABC News Nightline, March 6, 1984, Ted Koppel, anchorman ... 115
  Editorial "The Ideal World," dated April 1984, Jems ... 122
  Special Report "Influence Peddling Backfires," by Danny Pollock, April 1984, Jems ... 123
McGrath, Hon. J. Paul:
  Testimony ... 9
  Prepared statement ... 14
Riley, Joseph:
  Testimony ... 23
  Prepared statement ... 29
Smith, Carlos C.:
  Testimony ... 89
  Prepared statement ... 91
  Resolution on Municipal Antitrust Liability ... 104
Thurmond, Hon. Strom (chairman):
  Statement of Gerald L. Baliles, attorney general of Virginia, on behalf of the National Association of Attorneys General ... 144
  Report and recommendation of the Antitrust Subcommittee to Study Local Governmental Immunity, National Association of Attorneys General ... 152
    Airport services and concessions ... 169
    Draft report ... 178
    Supplemental report ... 192
    Draft bill ... 200
    Proposed resolution ... 201

APPENDIX

Additional Statements and Views of:

  Walt Atkins, City Councilman, Graham, NC ... 205
  S. Kenneth Howard, Executive Director, United States Advisory Commission on Intergovernmental Relations ... 206
  American Paper Institute ... 213
  Edison Electric Institute ... 220
  Joseph T. Conaway, County Administrator, Sussex County, Georgetown, DE ... 234
  Matthew B. Coffey, Executive Director, National Association of Counties ... 235
  Peter D. Herder, president, National Association of Home Builders ... 238
  Dick Hemstad, National Conference of State Legislatures ... 240
  Arden D. Ashley, mayor, Nitro, WV ... 242

THE LOCAL GOVERNMENT ANTITRUST ACT OF 1983—S. 1578

TUESDAY, APRIL 24, 1984

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met at 1:30 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senator Specter.

Staff present: W. Stephen Cannon, chief antitrust counsel, Joseph Gibson, research assistant, and Mary Louise Westmoreland, of Senator Specter's staff.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The Chairman. The hearing will come to order.

Today the committee begins consideration of S. 1578, the Local Government Antitrust Act. This legislation, sponsored by myself and 16 colleagues, is a response to recent Supreme Court decisions regarding the liability of local governments under our Federal antitrust laws.

Until the *city of Lafayette* decision in 1978, it was generally assumed that the Parker State Action Doctrine applied not only to States but local units of government as well. Further, in the 1982 *Boulder* decision, the Court found that a State's grant of home rule powers to a municipality was insufficient authorization by the State to cloak the municipality in State action immunity.

During the 97th Congress, the Committee on the Judiciary conducted hearings on the implications of *Lafayette* and *Boulder*. At that time, the *Boulder* decision was only a few months old and thus its effects were subject to great speculation. In the 2 years that have passed, however, *Boulder* has been the subject of intense fruitful debate and a great amount of information on this subject has been collected.

I am convinced that a legislative response to *Boulder* is necessary. S. 1578 attempts to resolve the difficult questions presented by *Boulder* and *Lafayette*. It balances the need for local governments to go about their daily functions without the paralyzing fear of antitrust lawsuits with the need to preserve the integrity of our Federal antitrust laws. I would note that S. 1578 does not automatically extend antitrust protection to local governments. Rather, local governments are given antitrust protection only to the extent that State government entities would be protected for similar activity. In addition, the local government activity must otherwise be valid under State law and must not involve the sale of goods or services in competition with private persons.

I am hopeful that the committee can process this legislation in the near future. Consequently, I would urge all interested parties to make their views known to the committee and offer any constructive criticism and suggestions for change in this legislation.

We are fortunate to have numerous distinguished witnesses today, and I look forward to hearing their testimony.

At this point, I wish to place a copy of S. 1578 into the record.

[Text of S. 1578 follows:]

II

98TH CONGRESS
1ST SESSION

S. 1578

To clarify the application of the Federal antitrust laws to local governments.

IN THE SENATE OF THE UNITED STATES

JUNE 29 (legislative day, JUNE 27), 1983

Mr. THURMOND (for himself, Mr. DECONCINI, Mr. DOMENICI, Mr. HATCH, Mr. HEFLIN, Mr. HELMS, Mr. LAXALT, Mr. PRYOR, and Mr. STEVENS) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To clarify the application of the Federal antitrust laws to local governments.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Local Government Antitrust Act of 1983".

SEC. 2. The Federal antitrust laws shall not apply to any law or other action of, or official action directed by, a city, village, town, township, county, or other general function unit of local government in the exercise of its regulatory powers, including but not limited to zoning, franchising, licensing, and the establishment of monopoly public services, but excluding any activity involving the sale of goods or services by the unit of local government in competition with private persons, where such law or action is valid under State law, except to the extent that the Federal antitrust laws would apply to a similar law or action of, or official action directed by, a State. For purposes of this section, the term "Federal antitrust laws" means the antitrust laws, as such term is defined in the first section of the Clayton Act (15 U.S.C. 12), and section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

The CHAIRMAN. I believe I see before me a very tall handsome Member of the Senate from Minnesota whom the ladies seem to adore, and we are delighted to have him with us today.

Senator Durenberger, we would be glad to hear from you at this time.

STATEMENT OF HON. DAVE DURENBERGER, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Senator DURENBERGER. Thank you, Mr. Chairman.

I wonder if I am the only person here who is not from South Carolina, when I look in the first and second rows behind me.

Thank you, Mr. Chairman. I am happy to have this opportunity to discuss with the committee the status of local governments under Federal antitrust law. I want to commend you for tackling this very difficult problem. That a major problem exists cannot be denied. The Supreme Court's recent *Boulder* decision is what really raised the issue to public view, although the genesis of the problem is found in several cases prior to *Boulder*.

I do not need to go into the history here, but let me say just a word about the *Boulder* decision. It means both more and less than is being attributed to it. First, the less. Contrary to a widespread perception by local officials, the *Boulder* decision did not remove local governments' immunity under the antitrust laws. It was, as you know, a very narrow decision. All *Boulder* did was restate the "State Action Doctrine," under which a local government is considered immune to Federal antitrust actions if the courts can find a "clearly articulated and affirmatively expressed" grant of the State's antitrust immunity somewhere in State law. The Court then went on to hold that a simple home rule charter is not sufficient to confer a State's immunity under this doctrine. In this sense, the decision was merely a refinement of a doctrine the Court had been enunciating over a period of years, and, in the long run, *Boulder* may become little more than a footnote to substantive antitrust case law.

At the same time, the *Boulder* decision has more far reaching implications for the home rule movement than a narrow legal reading suggests. By its decision in the *Boulder* case, the Court has cast doubt on a right many local governments thought they had already won from the States—the right of local self-government. The *Boulder* decision is in a very important sense, Federal preemption of State law. And, it is Federal preemption that creates a strange paradox for local governments. On the one hand, the Court finds that home rule cities are subject to Federal antitrust actions, unless their State has taken specific action beyond a home rule charter to extend its antitrust immunity. At the same time, under home rule, most States are precluded from passing the necessary legislation to grant the immunity, since States may not legislate to regulate home rule cities. The paradoxical result is that under the "State Action Doctrine," as articulated in *Boulder*, States may grant antitrust immunity to non-home rule local governments while being precluded under State law from granting home rule cities the same immunity. After *Boulder*, home rule cities enjoy neither the full autonomy of self-government nor the protective cloak of their States' sovereignty.

Now, Mr. Chairman, the easy solution to this dilemma is for Congress to act to grant local governments the same antitrust immunity the States themselves enjoy. This is the relief local governments petition us for today. While I am sympathetic to their problem, I cannot recommend that the committee take this route. The reason is simple. Right now, there is a genuine revolution going on at the local level with regard to the delivery of public goods and services. More and more local governments are acting like businesses—charging fees for the services they provide and providing services beyond those considered to be traditional public services. User fees, not taxes, are the fastest growing source of local revenue.

But while local governments are acting more like business enterprises, many are not acting like good businessmen. Public service bureaucracies which are monopoly providers have no yardstick by which to measure consumer satisfaction. Only the market can provide this yardstick. Whether it is garbage collection, public transportation, or health services, public sector monopolies tend to be inefficient—to grow fat and unresponsive to public will. Granting local governments total immunity to Federal antitrust laws would, I fear, only foster more inefficiency and unresponsiveness.

Mr. Chairman, I know you recognize what is at stake here. I congratulate you on your efforts in drafting S. 1578 to distinguish between proprietary activities in which local governments should be subject to antitrust actions, and traditional governmental activities in which they should be immune. Your legislation points us in the right direction—it offers a solution that gives local governments the protection they need to govern effectively at the same time it forces them to act in a manner compatible with a free market and public demand for greater efficiency in the provision of public services.

Having said this, let me discuss a potential problem I foresee with this approach if we do this and nothing more. The "proprietary distinction" is easy to draw in the abstract, but requires definition. Short of drawing up a list to specify what is and what is not "proprietary," Congress will be forced to fall back on the courts to give real definition to the distinction we are attempting to draw here. I recognize the difficulty the courts will have with this. The type of distinction is one we have attempted to draw in other areas of the law—for example, with industrial development bonds—and one that has always led to problems. The courts have always had trouble handling this distinction, and I believe we must recognize in taking this approach that we will be setting in motion a fairly lengthy process during which the courts will have to give definition to the "proprietary distinction." I can live with this if we protect local governments from potentially harmful effects that may result as the courts go through the process of defining what is a proprietary activity. Let me illustrate my concern by comparing what is happening now to what would likely occur if we passed the legislation before us.

Antitrust litigation is expensive. It requires expert legal advice not always available in city attorneys' offices. Local government groups argue that there has been a post-*Boulder* "flood" of municipal antitrust litigation that is frivolous, and in some cases extortionary. For example, they argue that a local business loses out on a contract and then brings suit as a means of pressuring the local government to make concessions. The local government may conclude that, even if it has a strong case under prevailing court rulings, it may be too expensive to win the case. Thus, the government may settle out of court.

If in fact suits are being brought for no other purpose than to extort local governments to give in to private interests, S. 1578, as presently drafted, will only shift the terms of the disputes, not end them. As a result, this type of litigation will continue, as suits are brought on the grounds that the activity in question is on the wrong side of the line drawn in S. 1578 to distinguish "proprietary" from "governmental" activities. The courts will ultimately be forced to settle the issue, and the litigation problem for local governments will continue.

S. 1578 provides the basic framework for a solution. It says, when local governments act like governments, they should not have the antitrust ax hanging over their heads. At the same time, if governments are going to act like businesses, they are going to be held to the same competitive standards as any other business enterprise. What we must face up to in adopting this approach is that the courts will ultimately sort out the gray areas that separate the two.

With this recognition, we can go on to build on S. 1578 to protect local governments from extortion by lawsuit. First, I would urge the committee to consider amending the law to give the courts discretion in determining the appropriate remedy to any successful antitrust action again a local government. In this regard, I believe treble damages are probably inappropriate against local governments. What the committee might want to consider is giving the courts the option either to grant simple injunctive relief to a prevailing plaintiff or to award single damages. In this way, the courts would be able to order the local government to cease and desist any anticompetitive propriety activities, and if the local government actions have caused real harm to a private party, the court would be able to compensate that party for actual damages.

At the same time, I urge the committee to grant local government officials immunity from personal damages under the antitrust laws. This would remove a real chilling effect local officials now feel in carrying out their official duties. The local government would remain subject to the discipline of antitrust damages, and the officials themselves would remain subject to personal action under section 1983 of the Civil Rights Act of 1871. Taken together, I believe these two provisions of law provide adequate restraints on local officials who may be tempted to act in an anticompetitive, proprietary manner.

There are other incremental changes the committee might want to consider to augment the approach taken in S. 1578. Recognizing the fact that litigation is likely to continue, it would make sense to amend the law to give courts the flexibility to weed out frivolous suits and to establish incentives against bringing them in the first place. For example, the committee might consider providing that prevailing defendants, as well as prevailing plaintiffs, be able to recover legal fees in antitrust suits against local governments. This is an approach that has worked well in several European countries, I understand.

Finally, I believe something should be done to repair the damage done to home rule by the *Boulder* decision. I believe Congress should amend the antitrust laws to state explicitly that a home rule charter is considered by Congress to confer a State's antitrust immunity on local governments unless such a charter provides otherwise. This would eliminate all doubt regarding congressional intent and would remove the cloud that presently hangs over home rule status.

This is a hoary issue, and I compliment the committee again for taking it on. I think you have made a good start, and if we can devise some way to address the inevitable litigation problem, it will take us a long way toward providing a reasonable solution.

Mr. Chairman, in closing, I want to compliment your staff on the work they have done on this legislation and extend my thanks to them for working so closely with my staff on the Intergovernmental Relations Subcommittee. If the Subcommittee can provide you further assistance, I would be happy to do whatever I can to move this issue toward a resolution.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator, I wish to thank you for your testimony and your presence and the kind contribution you have made to this hearing.

I want to ask you this now. As I understand, you would favor limits and relief against local governments for damages?

Senator DURENBERGER. I would, yes.

INJUNCTIVE RELIEF

The CHAIRMAN. And, of course, injunctive relief?

Senator DURENBERGER. That is right.

The CHAIRMAN. Would you be in favor of leaving that to a Federal Judge to make that decision or should this bill provide that it be limited?

Senator DURENBERGER. I believe I suggested the judge should have the discretion to go either via the injunctive relief route or single damages relief, depending on which is appropriate in the particular case.

The CHAIRMAN. But in no event treble damages?

Senator DURENBERGER. That is right, in no event treble damages.

The CHAIRMAN. I suspect much of the testimony we will hear today advances the argument that the home rule movement has been effectively halted by *Boulder*. Even if we decide today that each State should take care of the *Boulder* problem, how can a home rule State sufficiently authorize local action if it is prohibited from doing so by the State Constitution?

Senator DURENBERGER. You have hit on the heart of the problem here, Mr. Chairman. If we can make congressional intent clear with respect to Federal antitrust exemption, we would overcome the constitutional problem. The States do have a constitutional problem, given the *Boulder* decision, but if we can make our intent clear to distinguish the home rule area from the other, then, in my opinion, we have overcome that problem for the States.

The **Chairman**. Of course, the Federal statute would override a State Constitution provision or statute, would it not?

Senator **Durenberger**. I do not think a State constitution could currently stand in the way of a congressional mandate relative to antitrust. At the same time, it does currently stand in the way of the implementation of immunity under home rule because of the *Boulder* decision. So we have to, in effect, overturn that portion of the *Boulder* decision that discriminates against the home rule community.

The **Chairman**. Do you feel this bill we have presented here is adequate? If not, what suggested changes would you make other than the limit to single damages?

Senator **Durenberger**. The various changes I suggest are incorporated in my statement. I think you have the heart of the problem clearly defined, and that is the distinction between proprietary activities and governmental activities.

The next area in which I have suggested amendment is in the area in which the court has to make the decision about what is a proprietary activity and what is a governmental activity. We need in some way to facilitate that decision process so that it is not burdensome on local governments.

The **Chairman**. From a proprietary standpoint, as I understand, if you could sue a city, you would keep it within single damages under any condition?

Senator **Durenberger**. That is correct.

The **Chairman**. And nothing but single damages could be obtained?

Senator **Durenberger**. That is right. There appears to be a considerable amount of extortion by lawsuit going on out there on the part of contractors who have not gotten a contract from a city, and I think the threat of treble damages, as well as some of these other things, are causing governmental officials at the local level to make decisions they would not otherwise make because of the financial consequence. It is getting in the way of doing good local government.

The **Chairman**. Thank you very much. We appreciate the excellent contribution you have made here today, and we appreciate your taking the time to come to testify.

Senator **Durenberger**. Thank you, Mr. **Chairman**.

The **Chairman**. Our next witness is Hon. J. Paul McGrath, Assistant Attorney General, Antitrust Division, U.S. Department of Justice.

STATEMENT OF HON. J. PAUL McGRATH, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. **McGrath**. Thank you, Mr. Chairman. It is a pleasure to be here.

The **Chairman**. You have a rather long statement. Could you summarize it?

Mr. McGrath. I would like to ask the Chair to incorporate the written statement I submitted, and I would prefer to make just a few remarks summarizing the longer statement.

Mr. Chairman, it is a pleasure to be here this afternoon, and I am here, of course, to urge enactment of legislation such as S. 1578. The reason that we are here to urge support of such legislation this afternoon is that local governments today are threatened by extensive treble damage exposure which, unfortunately or fortunately, depending on how you look at it, is uncertain in scope and amount.

We are concerned that this exposure to treble damage litigation is potentially very disruptive to the operation of local governments because of the costs that are incurred in defending against litigation, because of the chilling effect the threat of personal exposure to damages can have on local officials, and because of the possibly enormous judgments that can be levied against local governments.

The legal problem has been put very simply by a number of scholars. Forty-one years ago in *Parker* v. *Brown,* the Supreme Court held that States and officials of State governments generally are immune from the antitrust laws. The reasoning of the Court was that the Sherman Act was not intended to interfere with actions of States and State officials when they are acting in their sovereign capacity.

The States, of course, more and more today perform many of their sovereign functions through local governmental bodies, either through home rule statutes or otherwise, and, of course, the States have been acting that way for sometime.

However, recently, in several decisions, the Supreme Court has indicated that the governmental actions of local governmental bodies may not be immune from the antitrust laws in certain cases. The principal decisions of the Supreme Court related to licensing, of cable television, and to the running of a municipally-owned electric power company. The Court held, in decisions that are not entirely clear in their scope, that actions of local governmental bodies are immune only if the conduct of the local government was undertaken under a State policy to supplant competition.

The problem is that applying this rather uncertain standard to varying State laws creates a great deal of confusion. The Supreme Court's test is difficult to apply. There has been a great deal of litigation over the application of this test, and the cases have involved activities which cut across the board of municipal activities.

In addition, there recently was a verdict in a case against the County of Lake and several other bodies in the State of Illinois—$28.5 million in a sewer case.

Mr. Chairman, in short, this is a matter of very serious concern to local governmental bodies all over the country, and I have met with representatives of a number of cities and counties and can testify from firsthand knowledge of the very deep concerns that have been voiced.

Those concerns have extended to all of the areas that I indicated before—the cost of litigation and the fear of personal liability to governmental officials—so there is a very real concern that governmental officials will not act forcefully in undertaking their responsibilities. Finally, there is the concern that a judgment can be levied against a municipal body that may exceed the funds available to that body to carry out its functions.

We believe that this problem can be cured through legislation. We believe that appropriate legislation would give local governmental bodies immunity that is comparable to that enjoyed by the States under *Parker* v. *Brown*, with two exceptions. One is that the States must be able to override the immunity of local governments and indicate what the State policy will be and, second, we believe that purely commercial activities should be excluded from this immunity.

S. 1578 accomplishes this goal because it would permit local governments to take steps to protect themselves against antitrust attack At the same time, it would permit the States to override the municipalities in this respect, and it would cover only regulatory functions such as zoning, franchising and licensing, and monopoly public services, and would exclude from the immunity the commercial activities of local bodies.

The reason why this kind of immunity is appropriate is that many of these activities of local governments are carried out under standards or with concerns that are quite apart from the normal competitive concerns that underlie the antitrust laws.

Mr. Chairman, we do have one suggestion to make concerning S. 1578. The most difficult aspect of the line drawing that is done in this statute is distinguishing between activities that are governmental and activities that are proprietary. S. 1578 distinguishes between regulatory activities of the State and the sale of goods or services. But I would note that, in many instances, traditional municipal functions have involved the sale of goods or services. Those functions include the provision of medical care, transportation and garbage collection. Many times the local government in one way or another may compete with others in the provision of those services and, in addition, may be in the commercial market for purchasing commodities.

Thus, we have suggested in an attachment to my prepared testimony an amendment to S. 1578 which would, I think, provide for a slightly better distinction between activities that are governmental and activities that are proprietary. I will not quote this language at this point because it is quoted in the attachment to my prepared testimony.

Except for that, Mr. Chairman, we believe that this legislation is urgently needed, and we would urge its enactment. I believe the amendment we have suggested is not in any way inconsistent with S. 1578. We believe it might help clarify the language of the statute, however.

I would be happy to answer any questions that you may have, Mr. Chairman.

The CHAIRMAN. Mr. McGrath, if your suggested amendment regarding commercial activities were to be adopted, what would it do in the pharmaceutical area?

Mr. McGRATH. I am sorry, Mr. Chairman, I did not hear all of that.

The CHAIRMAN. What would be the result if your amendment were applied in the pharmaceutical area?

Mr. McGrath. The result would be, I believe, there would be immunity in that case.

The Chairman. You have made a suggestion in this area, have you not?

Mr. McGrath. I am sorry. The pharmaceutical, the State run hospital situation? No, I am sorry. If the governmental body is purchasing commercial products in the normal commercial market, we do not believe that that activity would be immunized under the language of our proposed amendment. We do not believe it should be because that kind of activity could involve, for instance, conspiracy between a governmental body and others that could affect the normal commercial market.

In addition, if the question is immunity under the Robinson-Patman Act, which always involves the sale of commercial products, we also think the immunity would not apply to that situation.

The Chairman. In other words, if they are reselling in competition with private industry, it would not apply?

Mr McGrath. It would not apply.

INJUNCTIVE RELIEF

The Chairman. On page 4 of your written testimony, you make reference to the appropriateness of injunctive relief and the inappropriateness of personal liability for local government facilities.

Would the administration support amendments to S. 1578 which would limit local governments to injunctive relief and prohibit personal liability?

Mr. McGrath. What we were referring to in that particular sentence was something that goes beyond this bill. We were referring to the areas that would not be specially immunized under S. 1578.

What we were suggesting was that if legislation were proposed that would give blanket immunity from damages to municipal officials and municipal bodies, then we would not oppose such legislation; and if there were a general blanket immunity for officials of municipalities in their official capacities from damage liability, that might be appropriate. We think that in those circumstances it may well be appropriate to consider leaving the right of the Federal antitrust authorities to sue for injunctive relief so that something anticompetitive could not go——

The Chairman. As I understand your answer, you would favor amendment and relief against local government to injunctive relief?

Mr. McGrath. We would.

The Chairman. And also prohibiting personal liability?

Mr. McGrath. Yes, also prohibiting personal liability.

The Chairman. Mr. McGrath, you have suggested that specific units of government subject to popular election be included within the antitrust protection of this legislation.

Mr. McGrath. Yes, sir.

The Chairman. Why do you not favor including all specific functions?

Mr. McGrath. We were concerned that that went a little bit too far. Specific function units tend by definition to have narrower concerns. It was our feeling that either the States could pass specific language to deal with any antitrust problems that such specific function units may have, or that under the amendment we have proposed to S. 1578 the general function units of local governments would be able to incorporate through their local legislative process immunities for special function units under their control. Thus, we felt that if there was a problem with respect to special function units, that problem could be dealt with.

Since such units do operate in a very narrow area and are frequently not subject to such direct electoral control as general function units, we felt it was better to deal with it that way, rather than giving them direct immunity.

The CHAIRMAN. Mr. McGrath, this is the last question I have.

Your written testimony also references a tremendous cost inherent in defending antitrust suits. Would the administration favor a provision granting the court at least a discretion to award attorneys' fees to local governments successfully defending antitrust claims?

Mr. McGRATH. I would like to study such a provision, Mr. Chairman.

I have been concerned about changes in attorneys' fees provisions in the antitrust laws on an individualized basis. If there really were a showing of abuse of process, then that would be something I would think appropriate.

The CHAIRMAN. Would you think over these points that may be in question and confer with our chief counsel, Mr. Cannon, or Ms. Rogers on these matters. We want to move fast on this legislation because, in view of some of the litigation that has resulted in such large lawsuits and damages against cities, we really feel it is expedient to act in a hurry.

Mr. McGRATH. We certainly do agree with that, Mr. Chairman.

The CHAIRMAN. I think those are all the questions I have. We thank you very much for your appearance here, Mr. McGrath.

Mr. McGRATH. Thank you, Mr. Chairman.

[Prepared statement follows:]

U.S. Department of Justice

Washington, D.C. 20530

STATEMENT OF

J. PAUL MCGRATH
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to discuss with you S. 1578, a bill that would expand the antitrust immunity available to certain units of local government.

The Department of Justice strongly supports the enactment of legislation such as S. 1578, in order to alleviate the effect of recent court decisions on the operations of local governments, which now face the threat of treble damages, as well as the costs and disruption of antitrust litigation. Without such legislation local governments will be unable to govern in a manner necessary to protect the health, safety and welfare of their citizens. The application of the antitrust laws to municipal actions is the result of federal court decisions interpreting federal statutes in light of the intent of Congress. Thus, it is appropriate for Congress to provide the remedy to any problems for municipalities caused by the federal antitrust laws. I have an amendment to suggest, however, that in our view would greatly strengthen the bill.

Under the "state action" doctrine recognized by the courts, local governments are not afforded the same antitrust immunity available to states. In Parker v. Brown the Supreme Court held that the Sherman Act was not intended "to restrain a state or its officers or agents from activities directed by its legislature," nor to prohibit a restraint when "[t]he state . . . , as sovereign, imposed the restraint as an act of government." 1/ The Supreme Court has elaborated on this ruling in a number of recent decisions, two of which focused on the actions of municipalities.

In City of Lafayette v. Louisiana Power & Light Co., 2/ the Supreme Court held that the activities of city-owned electric power companies were not immune from the antitrust laws. The plurality opinion explained that municipalities, as subordinate units of state government, are not "the state as sovereign" and may claim immunity only if their conduct is undertaken pursuant to a state policy to displace competition with regulation or monopoly public service. A specific, detailed legislative authorization is not required under this standard; an adequate state mandate may be found if it appears from the authority given a governmental entity that the state legislature "contemplated the kind of action complained of." 3/ Chief Justice Burger concurred in the denial of state action immunity principally because the cities were involved in a proprietary activity in competition with private enterprise.

In Community Communications Co. v. City of Boulder, 4/ the Supreme Court refused to extend state action immunity to a city's regulation of cable television service under home rule powers granted by the state constitution. The Court held that, despite the city's constitutional home rule powers, it could not be deemed "the state as sovereign." Applying the state mandate test as phrased in California Retail Dealers Ass'n v. Midcal Aluminum, 5/ the Court held that the home rule provisions of the Colorado constitution did not constitute "clear articulation and affirmative expression" of a state policy to replace competition with regulation.

In summary, under the state action doctrine a local

1/ 317 U.S. 341, 350-51 (1943).

2/ 435 U.S. 389 (1978).

3/ 435 U.S. at 415 .

4/ 455 U.S. 40 (1982).

5/ 445 U.S. 97, 105 (1980).

government must rely on a mandate from the state legislature to provide antitrust immunity. Local governments are subject to the federal antitrust laws unless their actions are undertaken pursuant to a policy to displace competition with regulation or monopoly public service that has been clearly articulated and affirmatively expressed by the state in its sovereign capacity. The "clear articulation" requirement will be satisfied if the state contemplated the restraint allegedly imposed by the unit of local government, but not if the state's position toward the alleged restraint was one of neutrality.

Since units of local government often operate under broad delegations of authority, this standard may leave many activities that are both traditional and appropriate for municipalities subject to antitrust scrutiny. As a result, cities, counties, other units of local government, as well as public officials, face a significant risk of antitrust liability, including potentially devastating treble-damage liability. The recent jury verdict of $9.5 million (trebled to $28.5 million) on an antitrust claim against units of local governments and their officials in Unity Ventures v. County of Lake (No. 81 C 2745, N.D. Ill., January 12, 1984) has underscored the reality of the danger. It would seem more appropriate to have a legal remedy which permits only injunctive relief in those cases in which a local action is determined not to be exempt. In addition, holding public officials personally liable for antitrust violations creates an impediment to running for public office. Aside from the prospect of treble damage liability, the need to defend against antitrust suits may frequently be costly, and, even more troublesome, may be very disruptive of local governments' operations. Even if no suit has been filed, uncertainty about the substantive antitrust standards that would be applied to governmental conduct interferes with local governments' ability to plan and carry out their functions.

While several lower courts have applied Lafayette and Boulder recently in a manner that might assuage these fears to some extent, 6/ the frequency of antitrust suits against units of local government remains on the increase. These suits, moreover, have involved a wide variety of municipal operations, including licensing, franchising, zoning and the operation of public facilities such as airports or parking lots. In the view of the Department of Justice, the risk of damage and the costs imposed by the potential for antitrust liability justify relief for local governments and taxpayers in the form of a local government equivalent of the state action doctrine.

In our view, S. 1578 reflects an appropriate approach to this goal. It would overrule in part the Boulder/Lafayette standard, establishing a special rule for some, but not all, conduct performed or directed by general function units of local government. These local government activities would enjoy immunity if similar state activities would be immune, and if the activities were valid under state law. In certain instances, therefore, a "local government action" immunity, comparable to state action immunity, would flow from a local government's clear articulation and affirmative expression of a policy to displace competition with regulation or monopoly public service, coupled with active supervision of the implementation of that policy. This "local government action" immunity would apply only to the regulatory activities of general function units of local government, activities which would include zoning, franchising, licensing, and the establishment of monopoly public services. The availability of immunity for activities involving the sale of goods or services by the unit of local government in competition with private parties, on the other hand, would continue to depend on the existence of a state policy to limit competition.

S. 1578 would therefore allow local governments to take steps, through their own political and legislative processes, to afford immunity to the exercise of their traditional

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6/ E.g., Gold Cross Ambulance and Transfer and Standby Service, Inc. v. City of Kansas City, 705 F.2d 1005 (8th Cir. 1983); Town of Hallie v. City of Eau Claire, 700 F.2d 376 (7th Cir. 1983).

governmental powers. It is designed to ensure, on the other hand, that when local governmental units engage in normal commercial activities they will be subject to the same antitrust rules as other competitors, unless their conduct is undertaken pursuant to a specific policy of the state. Such a limited extension of immunity is a reasonable accommodation of local governments' legitimate concerns.

The legitimate interest of the states is also reflected in the bill's requirement that the actions of local governments be valid under state law if they are to be immune from antitrust attack. The bill would discourage state subdivisions from creating anticompetitive conditions in areas where the state legislature had no intention that they exercise governmental power and would deny immunity where the political and legislative process is subverted through the involvement of municipal officials directly and knowingly in private efforts to restrain trade. I would note that there is a risk that the requirement that local governments' conduct be valid under state law could be interpreted to deny immunity on the basis of purely technical procedural errors. We do not believe, however, that such an interpretation would be appropriate or that it is required by the language of the bill.

Obviously, a partial expansion of state action immunity such as that contained in S. 1578 presents difficult problems of line-drawing. Selecting the subordinate units of state government whose activities should be eligible for the local government action doctrine is such a problem, but we believe S. 1578 follows an appropriate approach in following the pattern of the state action immunity recognized by the courts. Under the state action doctrine, only acts of the "state as sovereign" are afforded immunity; subordinate governmental units of statewide jurisdiction may not claim immunity unless they act pursuant to a policy articulated by the state legislature (or other ultimate body wielding the state's power in a particular field). Similarly, the bill would restrict the local government immunity to acts of general function units of local government, which are directly responsible to the electorate and charged with balancing a wide variety of interests and policies. Special function units of local government subordinate to a general function unit could claim the local government action immunity created by the bill if they acted pursuant to a policy articulated by the general function unit. Special function units of less than statewide jurisdiction that are directly subordinate to the state, like their statewide counterparts, would be able to claim state action immunity if they acted pursuant to a state policy. Thus, the local government action doctrine would apply to policies of the local governmental units most closely analogous to the "state as sovereign" and least likely to repond to parochial calls for the elimination of competition.

It should be noted that, in some states, certain special function units of local government (such as school boards) may be directly responsible to the citizens through popular election and may be entirely independent of any general function unit of local government. If Congress concluded that such units should also be analogized to the state as sovereign, it could achieve that result by adding popular election as a standard of eligibility.

Drawing the line legislatively between traditional governmental activities and purely commercial conduct is another area of difficulty. This effort has some of the same inherent problems that have beset efforts to distinguish the "governmental" and "proprietary" activities of municipalities. 7/ S. 1578 approaches the problem by distinguishing the exercise of regulatory powers from activities involving the sale of goods or services in competition with private parties. However, denying immunity to all activities involving the sale of goods or services in competition with private parties may result in the exclusion of many traditional municipal functions, such as medical and other social services, transportation, and garbage collection. Such

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7/ See, City of Lafayette, supra, 435 U.S. at 433-434 (Stewart, J., dissenting).

functions may be as critical to the effective operation of local government as strictly "regulatory" functions. Moreover, such public services may be operated so as to further a public interest inconsistent with purely commercial methods of operation. For example, a city might decide to provide ambulance service primarily to assure service to those who cannot afford private ambulance services or who live in areas not well served by such enterprises. Even if the municipal service were provided on a very limited basis, solely to fill needs unmet by private services, it would arguably be in competition with them, and thus might be deemed ineligible for the immunity provided by S. 1578. It is not clear that such a result is intended.

Additionally, the bill does not make clear the limits of the immunity granted with respect to monopoly public services that affect a competitive market. For example, a municipal electric utility, established as a monopoly public service, might in certain respects be considered to be an activity in competition with private persons (e.g., parties outside the city's borders or those who provide alternative services within the city). Moreover, the utility might purchase supplies in competitive markets. The bill does not clearly distinguish a local governmental policy decision to establish the utility on a monopoly basis (and the competitive consequences of that decision) from purely commercial conduct by the utility that is unrelated to that policy decision.

Therefore, we suggest that the description of the eligible activities in section 2 of the bill be amended to clarify the distinction between governmental and purely commercial conduct. Attached to this testimony is a proposed amendment that we believe would accomplish this goal. It would specifically include the "establishment or provision of public services on an exclusive or nonexclusive basis in a manner designed to ensure public access or otherwise to protect the public health, safety, or welfare." The proposed amendment would exclude, on the other hand, the "purchase or sale of goods or services on a commercial basis by the unit of local government in competition with private persons."

This language would make it clear that the operation of a public service in a manner deemed by the local government to further a public interest would be immunized, if valid under state law, without regard to the existence of private firms that might be considered competitors. The local government would not have to demonstrate that its action was strictly necessary to achieve the public interest goal, but only that it was the result of a governmental decision that the public interest would be served by departing from the usual standards of the marketplace. For example, the decision of a general function unit of local government to exclude competition and establish a monopoly public service would be eligible for immunity, as would operation of a public service on a subsidized basis in order to assure access to all citizens. Conduct by subordinate agencies undertaken pursuant to such a policy would also be immunized.

Where the particular conduct challenged, on the other hand, merely represented a commercial transaction in a competitive market--involving no pointed decision by the general function unit of local government to displace competition--no special immunity would be available under the language we suggest. Thus, for example, the purchase of supplies in a competitive market by a public service would not generally be eligible for the immunity, nor would its participation in private agreements with competitors designed only to increase its profitability. In our view, the suggested language would more clearly express what we understand to be the intent of the drafters.

In summary, the Department of Justice strongly supports the efforts of Congress to respond to the legitimate concerns of local government officials by affording local governments broader antitrust immunity. In our view, S. 1578 reflects an appropriate approach, but we urge that it be clarified along the lines of the attached amendment to make unambiguous the protection it affords local governments for their traditional governmental activities.

APPENDIX

The Department of Justice proposes that Section 2 of S. 1578 be amended as follows [material to be deleted is in brackets and material to be inserted is underlined]:

> SEC. 2. The Federal antitrust laws shall not apply to any law or other action of, or official action directed by, a city, village, town, township, county, or other general function unit of local government in the exercise of its regulatory powers, including but not limited to zoning, franchising, licensing, and the establishment [of monopoly public services,] or provision of public services on an exclusive or nonexclusive basis in a manner designed to ensure public access or otherwise to protect the public health, safety, or welfare, but excluding [any activity involving] the purchase or sale of goods or services on a commercial basis by the unit of local government in competition with private persons, where such law or action is valid under State law, except to the extent that the Federal antitrust laws would apply to a similar law or action of, or official action directed by, a State. For purposes of this section, the term "Federal antitrust laws" means the antitrust laws, as such term is defined in the first section of the Clayton Act (15 U.S.C. 12), and section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

The CHAIRMAN. Our next witness is the mayor of one of the most unique cities in the United States. He is a young, progressive, enterprising mayor, and we are pleased to have him here. Incidently, I understand your car will be down at the corner of this building when you are ready to go, so you will not waste any time.

Mr. Leventis, you may come up to the table. Mr. Leventis is a very able lawyer from South Carolina who is in a very responsible position, and we are happy to have him with us.

Incidentally, your sister is in the back there. You may want to speak to her.

I would also ask the mayor of York, PA, Mr. Althaus, to come up to the table to serve on this panel.

Ms. Paul, if you want to come up and sit with the Mayor, you can come up closer.

We are very pleased to have you gentlemen with us.

Mr. Mayor, I believe you want to catch a plane so we will take you first. You can put your whole statement in the record or present it in full, as you see fit.

STATEMENTS OF PANEL CONSISTING OF HON. JOSEPH RILEY, MAYOR, CHARLESTON, SC, ON BEHALF OF THE NATIONAL LEAGUE OF CITIES; HON. JAMES C. LEVENTIS, CHAIRMAN, RICHLAND COUNTY COUNCIL, RICHLAND COUNTY, SC, ON BEHALF OF THE NATIONAL ASSOCIATION OF COUNTIES; AND HON. WILLIAM J. ALTHAUS, MAYOR, YORK, PA, ON BEHALF OF THE U.S. CONFERENCE OF MAYORS

Mayor RILEY. I would appreciate it if you would accept my statement for the record, and I will make a few short remarks.

The CHAIRMAN. Without objection, your entire statement will go in the record and you may summarize it or make such remarks as you care to.

Mayor RILEY. Thank you very much, Mr. Chairman.

I am representing my city and 15,000 cities in the United States represented by the National League of Cities, to urge immediate congressional action on a matter of great concern to every city in the Nation—Federal legislation to protect cities from antitrust liability. We commend you, as Senator Durenberger previously stated, on seizing the initiative on this critical and complicated legislative issue.

The Supreme Court's recent ruling in *Community Communications* v. *the City of Boulder* makes cities and other local governmental entities subject to the antitrust laws, thereby dramatically changing the positions of cities under the antitrust laws and jeopardizing the ability of our cities to effectively govern.

To put this matter in perspective, Greenwood Village is a city of 6,000 people in Colorado on the outskirts of Denver. Apparently the village is a defendant in an $850 million antitrust lawsuit, which is basically a land-use planning or zoning related issue. I calculated that this amount was equivalent to each citizen in Greenwood Village having to pay $141,666.

To put this in the Federal perspective, if a Federal lawsuit were brought against the United States, dollar-wise from the Federal

Government's perspective, that would be a lawsuit of $35 trillion, 291 billion, 500 million.

Clearly, the financial threat that the *Boulder* decision poses to small, medium and large cities in our country is enormous.

The *Boulder* ruling has spawned hundreds of antitrust challenges to basic municipal actions, such as zoning, franchising and licensing practices.

The severity of this problem now confronting the cities is best exemplified by the recent Federal court decision in *Unity Ventures* v. *County of Lake, Illinois,* where treble damages amounting to $28.5 million were awarded against a community of 6,000 people for not running a sewer line 2 miles out of its jurisdiction to an area that would be developed. The outrageous thing is that, under this opinion, a Federal judge had a power of mandamus plus penalties to force a local government to tell it where to run a sewer line at severe penalty to the local government. The *Boulder* case has raised many questions which cannot be answered.

The CHAIRMAN. Has that judgment already been obtained?

Mayor RILEY. Yes.

You mentioned the legal fees. This is a small community of 6,000 people. This is its appellate brief, 129 pages, and as a lawyer, I am happy to see the legal profession thriving. However, we do not want it to be at a great disadvantage to local governments in the United States.

The CHAIRMAN. It is under appeal now?

Mayor RILEY. Yes, sir, it is under appeal now.

The *Boulder* case has raised many questions which cannot be answered until the courts solve each one by the drawnout method of case-by-case litigation. This will take years, if not decades, and will stymie local governments as well as create severe financial burdens.

Some of the more troublesome questions include: Is there any way for a State Legislature to enact legislation protecting cities from antitrust liability which will definitely be upheld by the courts?

Second, must home rule cities relinquish their home rule powers in order to be protected from antitrust liability?

The *Boulder* decision threatens to wipe home rule powers away almost overnight. Is active State supervision of local actions, as appears to be required by case law, necessary in order for municipal action to be exempt from antitrust liability? If so, what a tremendously unwieldy process this would create.

Next, will the courts apply to municipal actions the existing strict antitrust rules, under which certain actions are automatically deemed to be violations of the antitrust laws and under which benefits to the public cannot be considered?

Will the courts automatically impose treble damages on cities whenever a city is adjudged to have violated the antitrust laws? This has already been discussed.

Next, what municipal actions are vulnerable to challenge under the antitrust laws?

The answers to these questions would be unfavorable to local governments and the process of answering them on a case-by-case basis. would take years What we have, which is even more important than the financial threat, is that cities under this decision, without Federal action, have lost the ability to control their destiny.

Let me give you a good Charleston example which you would relate to.

One of the chief quality of life issues in our city is what we call tourism management, with the wonderful growth of our tourism industry which we are very proud. Related to that is the need to make sure that the residential sections of our city have a good quality of life. We want visitors to enjoy those sections of our city but not to overrun them.

I appointed a committee of civic leaders, community leaders, many of whom you know, and we worked 3 years to come up with an ordinance to address comprehensively this issue. One of the committee's recommendations was that we limit the number of buses and carriages that could go through the residential district, because it is small and delicate, and there is only so much of that kind of traffic that it can bear.

Under *Boulder*, we cannot enact that ordinance. Our lawyers told us categorically we do not have the authority to control the number of buses and carriages. That would be restricting competition. We would, in essence, be franchising. So we have lost the ability to control our destiny to manage the quality of life.

We either have to allow as many buses and carriages as want to go through the area, or we have to eliminate them completely. So we have lost the ability to govern that.

Second, a Federal policy has been established through the UDAG Program and others to develop an economic development partnership in our cities. Cities, of necessity, become a partner with the Federal Government and the private sector. A city is in danger when it is involved in a particular economic development program in one section of the city and makes a zoning decision adverse to another would-be developer in another section of the city. That developer then brings into question the city's involvement in the economic development project and threatens to bring an antitrust action if the zoning or the particular use of the land that the developer wants is not granted.

In a city like Charleston and in many cities in our country where the quality of life is important and where the skyline needs to be preserved, what is built needs to be carefully considered. The threat of *Boulder* hanging over our shoulders may well chill the ability of local government to make those hard land-use decisions.

We are losing the ability to control our cities.

Under *Boulder*, we have had a tremendous setback on our capacity to control our destiny.

The antitrust laws reflect a determination by Congress that the protection and enhancement of competition are fundamental national policy objectives. It is our view that it is Congress' duty to apply the antitrust laws in a uniform and responsible fashion, taking into account such matters as the impact of the antitrust laws on local government's ability to govern.

We do not believe that it is necessary to subject cities to antitrust liability in order to protect and enhance competition. Prior to the Supreme Court's 1982 decision in the *Boulder* case to subject cities to the antitrust laws, the activities of cities were not regarded as major obstacles to realization of these objectives of competition.

There was no movement in Congress, and I submit in most States in our country, to subject local government to antitrust regulations.

In view of the serious threat to the ability of local governments to govern represented by the *Boulder* case, the National League of Cities strongly urges Congress to amend the antitrust laws to establish a municipal action exemption which parallels that of the States under the *Parker* State action exemption.

Especially troublesome to us is a proposal supported by the National Conference of State Legislatures for enactment of an amendment to the antitrust laws under which the States would be authorized to delegate antitrust immunity to cities and counties on the basis of broad guidelines established by Congress. Such an approach would result in widely varying antitrust policy from State to State.

We also believe that would raise significant 10th Amendment questions.

We believe, Mr. Chairman, that your bill, S. 1578, represents an excellent starting point for the establishment of municipal action exemption. Generally, it takes the approach to the issue which we have advocated—a city should be exempt from antitrust liability unless the antitrust laws would apply to a similar law or action of a State.

All we want is to be treated as the States are treated under the antitrust laws.

We do submit a number of provisions we think are necessary to give cities adequate protection.

First, the exemption should apply to any action taken by a city. S. 1578 would exempt only actions by a local government which are the exercise of its regulatory powers, included but not limited to zoning, franchising, licensing, and the establishment of monopoly public services.

We do not believe that a distinction should be made between governmental and proprietary action because of the constantly changing nature of governmental responsibilities and the difficulties the courts have encountered in making these distinctions.

I will remind all that the most noted authority on tort law in the United States, Professor Prosser, states that coming up with a definitive position as to what is governmental and what is proprietary is unlikely. In other words, would the decision to grant a development grant be regulatory or proprietary? Would the issuance of industrial bonds be governmental or proprietary? Would transit be governmental or proprietary?

We believe these activities should be protected by the local governments as well.

Second and quickly, the exemption should apply to city officials who are responsible for developing and implementing municipal policy.

S. 1578 would not specifically exempt city officials, and the threat of personal liability could well chill the participation in local government by those who might seek public office.

Third, special purpose units of government should be exempt as well.

In Charleston, we created an area-wide regional transportation authority because, as the community grew, and the same thing happened in Columbia, it was unreasonable for the city alone to be running a large airport. Airport authorities, metropolitan transit authorities, and other special purpose units of government need the protection because they are in essence running a function of government that cities heretofore provided.

Fourth, S. 1578 would not exempt from antitrust liability any activity involving the sale of goods or services. In theory, the principle is reasonable but the questions, such as public hospitals which cities and counties run not because they are eager, but because the private sector is not able to render the service.

Fifth, S. 1578, we submit, should be revised to prohibit the awarding of damages, as you have already mentioned, in all cases involving city officials. There is no circumstance in which it is appropriate to require the payment of damages by a city to a private party under the antitrust laws. We could bankrupt many cities in our country by these large potential verdicts.

In conclusion, Mr. Chairman, the time has come for Congress to enact legislation which would protect cities from antitrust liability. We do not believe that a matter of such fundamental importance to every city in the Nation should be left to the courts on a case-by-case basis or the State legislatures. It is our view that cities should have an exemption similar to that of the States. States are protected from antitrust liability whenever they establish affirmative policies of displacing competition with regulation or monopoly public service. We see no reason for treating cities any differently from States.

We urge the committee to act promptly on this legislation.

In closing, Mr. Chairman, I always am interested in the dichotomy between public statements and reality when it comes to local government. Other levels of government at the State and Federal level say that local governments are closest to the people, the most approachable, and that local governments hear the citizens the best. You respond most quickly, we are told, yet on the other hand, in a matter like antitrust, we need another level of government to tell us what to do. If cities abuse antitrust powers, the citizens that they are closest to have the power through the ballot box to correct those deficiencies.

On behalf of the National League of Cities and the city of Charleston, Mr. Chairman, we thank you for affording us this opportunity, and we thank you for submitting this legislation.

I will be happy to answer any questions if you have any.

The CHAIRMAN. Mr. Mayor, if a city is competing directly in the commercial market on a private basis, do you think it is bad for that city to have antitrust immunity while the competitors are still subject to the antitrust laws?

Mayor RILEY. If the national policy would prohibit such activity, by a State whatever it is, then we think it should be prohibited at the local level. We do not think that cities should be treated differently.

There is a gray area. For example, a gray area would be the operation of a municipal marina, where we have tour boats. We think that the marina is filled to capacity and another operator comes in and says he wants to operate out of our marina. He says we have enough additional space, and that if we do not let him in, then we are sanctioning a monopoly. Then he says "We will sue you under the antitrust laws." That may or may not happen, but there is a gray area there that creates problems. We are willing to live by whatever standard the Federal Government establishes for the States.

The **CHAIRMAN**. In other words, you want local governments to be put on the same basis as the States?

Mayor **RILEY**. Yes, sir.

The **CHAIRMAN**. I think that was about the only question I had, Mr. Mayor. We are very pleased to have you here. You have made an excellent statement and you can rest assured the committee will give this matter full consideration.

[Prepared statement follows:]

STATEMENT

OF

JOSEPH RILEY, MAYOR

CHARLESTON, SOUTH CAROLINA

FOR THE

NATIONAL LEAGUE OF CITIES

APRIL 24, 1984

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE: I AM JOSEPH RILEY, MAYOR OF CHARLESTON, SOUTH CAROLINA. I AM A MEMBER OF THE NATIONAL LEAGUE OF CITIES' ADVISORY COUNCIL AND HAVE SERVED AS CHAIR OF NLC'S COMMUNITY AND ECONOMIC DEVELOPMENT COMMITTEE. I AM APPEARING TODAY ON BEHALF OF THE NATIONAL LEAGUE OF CITIES, WHICH REPRESENTS 15,000 CITIES, TO URGE IMMEDIATE CONGRESSIONAL ACTION ON A MATTER OF GREAT CONCERN TO EVERY CITY IN THE NATION -- FEDERAL LEGISLATION TO PROTECT CITIES FROM ANTITRUST LIABILITY.

INTRODUCTION

THE SHERMAN ACT WAS ORIGINALLY ENACTED IN 1890 FOR THE PURPOSE OF LIMITING THE CONCENTRATION OF PRIVATE ECONOMIC POWER, PARTICULARLY THE TRUSTS WHICH WERE TAKING OVER LARGE AREAS OF THE ECONOMY. THE ANTITRUST LAWS HAVE BEEN GRADUALLY REFINED AND CLARIFIED BY CONGRESS AND THE COURTS IN THE YEARS SINCE ENACTMENT OF THE SHERMAN ACT AND NOW SERVE THE IMPORTANT ROLE IN OUR ECONOMIC SYSTEM OF PROTECTING AND ENHANCING COMPETITION.

THE ANTITRUST LAWS WERE GENERALLY REGARDED AS APPLYING ONLY TO PRIVATE CONDUCT FOR MORE THAN 70 YEARS, AS IS INDICATED BY THE THE SUPREME COURT ESTABLISHMENT OF THE STATE ACTION EXEMPTION IN PARKER V. BROWN, 317 U.S. 341 (1943). SPECIFICALLY, THE SUPREME COURT RULED IN THAT CASE THAT NEITHER THE LANGUAGE NOR THE LEGISLATIVE HISTORY OF THE SHERMAN ACT INDICATED CONGRESSIONAL INTENT TO CONTROL THE BEHAVIOR OF A STATE. AFTER THE PARKER RULING, THE COURTS, IN APPLYING THE STATE ACTION EXEMPTION, FOCUSSED ON CLARIFYING THE EXTENT TO WHICH STATE AUTHORIZATION AND SUPERVISION WERE NECESSARY IN ORDER TO EXEMPT ANTICOMPETITIVE PRIVATE ACTIONS WHICH HAD BEEN SANCTIONED BY THE STATE. IN THOSE FEW CASES IN WHICH THE COURTS FOUND STATE AUTHORIZATION OR SUPERVISION TO BE INSUFFICIENT, THE COURTS DID NOT SUBJECT THE STATE TO ANTITRUST LIABILITY, BUT RATHER DEALT ONLY WITH WHETHER THE PRIVATE ACTION AT ISSUE SHOULD BE SUBJECT TO ANTITRUST REVIEW. IN FACT, UNTIL THE SUPREME COURT'S 1978 RULING IN CITY OF LAFAYETTE V. LOUISIANA POWER AND LIGHT CO., 435 U.S. 389, IT WAS GENERALLY ASSUMED THAT LOCAL GOVERNMENTS AND OFFICIALS, LIKE STATE GOVERNMENTS AND OFFICIALS UNDER THE PARKER EXEMPTION, WERE SAFE FROM ANTITRUST LIABILITY.

THE SUPREME COURT RULED IN THE LAFAYETTE CASE THAT CITY ACTIONS WERE SUBJECT TO ANTITRUST LIABILITY UNLESS THE ANTICOMPETITIVE ACTION AT ISSUE WAS AUTHORIZED BY THE STATE PURSUANT TO A STATE POLICY OF DISPLACING COMPETITION WITH REGULATION. BECAUSE THE LAFAYETTE RULING WAS A PLURALITY RULING AND BECAUSE THE MUNICIPAL ACTIONS AT ISSUE WERE COMPLETELY COMMERCIAL IN NATURE (I.E., THE OPERATION OF AN ELECTRIC UTILITY), IT DID NOT DEFINITIVELY ESTABLISH THAT MUNICIPALITIES WERE SUBJECT TO THE ANTITRUST LAWS.

IT WAS THE SUPREME COURT'S RECENT RULING IN COMMUNITY COMMUNICATIONS CO., INC. V. CITY OF BOULDER, 455 U.S. 40 (1982), THAT CITIES AND OTHER LOCAL GOVERNMENT ENTITIES WERE SUBJECT TO THE ANTITRUST LAWS, WHICH DRAMATICALLY CHANGED THE POSITION OF THE CITIES UNDER THE ANTITRUST LAWS, JEOPARDIZING THE ABILITY OF CITIES TO GOVERN. THE STATES AND THE FEDERAL GOVERNMENT, ON THE OTHER HAND, REMAIN FREE FROM LIABILITY UNDER THE ANTITRUST LAWS.

THE BOULDER DECISION HAS MADE THE TASK OF GOVERNING AT THE LOCAL LEVEL VERY DIFFICULT BECAUSE GOVERNMENTAL ACTIONS, BY THEIR NATURE, HAVE AN IMPACT ON COMPETITION. IN EFFECT, THE JUDICIAL BRANCH HAS DETERMINED, ON THE BASIS OF AN EXPANSIVE INTERPRETATION OF AN ACT OF CONGRESS, THAT A CITY'S ACTIONS CAN BE CHALLENGED UNDER THE FEDERAL ANTITRUST LAWS IF THEY HAVE AN

IMPACT ON COMPETITION, REGARDLESS OF THE BENEFITS TO THE PUBLIC FROM THE ACTION IN QUESTION.

THE BOULDER RULING HAS RAISED MORE QUESTIONS THAN IT HAS ANSWERED. AS A RESULT, ACCORDING TO THE ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, IT HAS SPAWNED HUNDREDS OF ANTITRUST CHALLENGES TO BASIC MUNICIPAL ACTIONS SUCH AS ZONING, FRANCHISING, AND LICENSING PRACTICES, ACTIONS WHICH CITY OFFICIALS HAVE ALWAYS REGARDED AS NECESSARY TO PROTECT THE COMMUNITY'S GENERAL INTERESTS.

THE SEVERITY OF THE PROBLEM NOW CONFRONTING CITIES IS BEST EXEMPLIFIED BY A RECENT ACTION OF A FEDERAL COURT JURY IN ILLINOIS. A $9.5 MILLION ANTITRUST JUDGEMENT WAS RETURNED ON JANUARY 12 AGAINST TWO LOCAL GOVERNMENTS AND SEVERAL ELECTED OFFICIALS IN UNITY VENTURES V. COUNTY OF LAKE (N.D. ILL. 81C2745), A CASE INVOLVING A DISPUTE OVER DEVELOPMENT RIGHTS AND SEWAGE TREATMENT PERMITS. THOSE DAMAGES WERE AUTOMATICALLY TREBLED TO $28.5 MILLION BY THE JUDGE AS IS REQUIRED BY THE SHERMAN ACT.

THUS, WHAT WAS ONCE LIGHTLY DISMISSED BY SOME AS A PROBLEM WHICH THE COURTS WOULD TAKE CARE OF IN A RESPONSIBLE WAY HAS NOW BECOME A REAL THREAT TO THE VIABILITY OF CITIES AS GOVERNMENTAL ENTITIES. THE PLAINTIFF'S INITIAL SUCCESS IN THE UNITY VENTURES CASE IS LIKELY TO ENCOURAGE MORE ANTITRUST LITIGATION AGAINST CITIES AND THEIR OFFICIALS.

IN THE BOULDER CASE, THE SUPREME COURT RULED THAT ANTICOMPETITIVE ACTIONS BY A CITY ARE EXEMPT FROM ANTITRUST CHALLENGE ONLY IF TAKEN PURSUANT TO A "CLEARLY ARTICULATED AND AFFIRMATIVELY EXPRESSED" STATE "POLICY TO DISPLACE COMPETITION." SPECIFICALLY, THE SUPREME COURT RULED THAT LOCAL REGULATION OF CABLE TELEVISION ON THE BASIS OF A STATE LAW WHICH CONFERRED BROAD HOME RULE AUTHORITY ON CITIES WAS NOT PROTECTED BY THE STATE ACTION EXEMPTION.

THE BOULDER CASE HAS RAISED MANY QUESTIONS WHICH CANNOT BE ANSWERED UNTIL THE COURTS RESOLVE EACH ONE THROUGH THE LONG DRAWN-OUT PROCESS OF CASE-BY-CASE LITIGATION. IN THE MEANTIME, CITIES WILL FACE INCALCULABLE RISKS AS THEY CONTINUE TO GOVERN IN A CLIMATE OF GREAT UNCERTAINTY. SOME OF THE MORE TROUBLESOME QUESTIONS INCLUDE:

- IS THERE ANY WAY FOR A STATE LEGISLATURE TO ENACT LEGISLATION PROTECTING CITIES FROM ANTITRUST LIABILITY WHICH WILL DEFINITELY BE UPHELD BY THE COURTS?
- MUST HOME RULE CITIES RELINQUISH THEIR HOME RULE POWERS IN ORDER TO BE PROTECTED FROM ANTITRUST LIABILITY?
- IS ACTIVE STATE SUPERVISION OF LOCAL ACTIONS, AS APPEARS TO BE REQUIRED BY CASE LAW, NECESSARY IN ORDER FOR MUNICIPAL ACTION TO BE EXEMPT FROM ANTITRUST LIABILITY?
- WILL THE COURTS APPLY TO MUNICIPAL ACTIONS THE EXISTING STRICT ANTITRUST RULES, UNDER WHICH CERTAIN ACTIONS ARE AUTOMATICALLY DEEMED TO BE VIOLATIONS OF THE ANTITRUST LAWS AND UNDER WHICH BENEFITS TO THE PUBLIC CANNOT BE CONSIDERED?
- WILL THE COURTS AUTOMATICALLY IMPOSE TREBLE DAMAGES ON CITIES WHENEVER A CITY IS ADJUDGED TO HAVE VIOLATED THE ANTITRUST LAWS?
- WHAT MUNICIPAL ACTIONS ARE VULNERABLE TO CHALLENGE UNDER THE ANTITRUST LAWS?

APPLICATION OF THE ANTITRUST LAWS TO CITIES

STATE LEGISLATION. AS A RESULT OF THE BOULDER RULING, ANY ACTION BY A CITY, INCLUDING A GOVERNMENTAL ACTION, MAY BE CHALLENGED UNDER THE ANTITRUST LAWS. ACCORDING TO THE BOULDER RULING, A

CITY CAN BE PROTECTED FROM ANTITRUST CHALLENGE UNDER THE STATE ACTION EXEMPTION ONLY IF ITS ACTIONS ARE CLEARLY BASED ON A STATE LAW WHICH AUTHORIZES THE SUBSTITUTION OF LOCAL REGULATION FOR COMPETITION. IT HAS NOT YET BEEN DEFINITIVELY DETERMINED BY THE COURTS WHETHER SPECIFIC STATE AUTHORIZATION OF PARTICULAR LOCAL ACTIONS, INCLUDING DETAILED AUTHORIZATION OF EACH ASPECT OF LOCAL REGULATION, IS NECESSARY IN ORDER FOR MUNICIPAL ACTIONS TO BE EXEMPT UNDER THE STATE ACTION DOCTRINE.

HOME RULE POWERS. UNDER THE BOULDER RULING, IT APPEARS THAT NO CITY WITH BROAD HOME RULE AUTHORITY CAN BE EXEMPT FROM ANTITRUST LIABILITY UNLESS HOME RULE POWERS ARE RELINQUISHED. IN STATES IN WHICH CITIES HAVE BROAD HOME RULE AUTHORITY, THE STATE LEGISLATURES GENERALLY DO NOT HAVE AUTHORITY TO INTERVENE IN MATTERS OF LOCAL CONCERN. THUS, IF LOCAL GOVERNMENTS HAVE AUTONOMY IN LOCAL MATTERS UNDER EXISTING STATE LAW, THEY CANNOT BE PROTECTED FROM ANTITRUST LIABILITY UNLESS FUNDAMENTAL CHANGES ARE MADE IN STATE LAW IN ORDER TO AUTHORIZE SUBSTANTIAL STATE INVOLVEMENT IN LOCAL MATTERS.

STATE SUPERVISION. THE BOULDER RULING DID NOT PRECLUDE THE APPLICATION TO CITIES OF THE EXISTING ANTITRUST RULES WHICH GOVERN PRIVATE CONDUCT. UNDER ONE EXISTING RULE, THE COURTS HAVE REQUIRED ACTIVE STATE SUPERVISION OF PRIVATE ACTIONS IN ORDER FOR THOSE ACTIONS TO BE PROTECTED BY THE STATE ACTION EXEMPTION: "... THE CHALLENGED RESTRAINT MUST BE 'ONE CLEARLY ARTICULATED AND AFFIRMATIVELY EXPRESSED' BY THE STATE ..." CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION V. MIDCAL ALUMINUM, INC., 445 U.S. 97 (1980).

IN THE MIDCAL CASE, THE SUPREME COURT INVALIDATED A STATE LAW UNDER WHICH PRIVATE PARTIES WERE EFFECTIVELY ALLOWED TO SET PRICES BY AGREEMENT WITHOUT DIRECT STATE SUPERVISION.
CLEARLY, PRIVATE ACTIONS CANNOT BE IMMUNE FROM ANTITRUST CHALLENGE UNDER THE STATE ACTION EXEMPTION IN THE ABSENCE OF ACTIVE STATE SUPERVISION. IF THE COURTS EXTEND THE MIDCAL REQUIREMENT OF ACTIVE STATE SUPERVISION TO MUNICIPALITIES, THEN

MUNICIPAL ACTIONS COULD BE PROTECTED FROM ANTITRUST CHALLENGE UNDER THE STATE ACTION EXEMPTION ONLY IF THE MUNICIPALITY'S ACTIONS WERE SUBJECT TO OVERSIGHT AND REVIEW UNDER A COMPREHENSIVE STATE REGULATORY SCHEME.

ANTITRUST RULES. OF FUNDAMENTAL CONCERN IS WHETHER THE COURTS WILL APPLY EXISTING PER SE AND RULE OF REASON STANDARDS TO MUNICIPAL ACTIONS. IF THE PER SE RULES, UNDER WHICH ACTIVITIES SUCH AS PRICE-FIXING, GROUP BOYCOTTS, AND TERRITORIAL ALLOCATIONS ARE AUTOMATICALLY DEEMED TO BE VIOLATIONS OF THE ANTITRUST LAWS, ARE APPLICABLE, THEN A WIDE RANGE OF GOVERNMENTAL ACTIVITIES MAY AUTOMATICALLY BE REGARDED AS VIOLATIONS OF THE ANTITRUST LAWS. FOR EXAMPLE, THE REGULATION OF RATES MIGHT BE CONSTRUED TO BE PRICE-FIXING; THE SELECTION OF A SINGLE FRANCHISEE OR THE OPERATION OF A MUNICIPALLY-OWNED UTILITY MIGHT BE CLASSIFIED AS A GROUP BOYCOTT.

EVEN IF THE COURTS DECIDE NOT TO APPLY THE PER SE STANDARDS TO CITIES, THE RULE OF REASON STANDARDS ARE LIKELY TO CAUSE EQUALLY DIFFICULT PROBLEMS FOR CITIES. UNDER THE RULE OF REASON, WHICH GENERALLY APPLIES TO CONDUCT WHICH IS NOT A PER SE VIOLATION OF THE ANTITRUST LAWS, THE IMPACT OF THE CONDUCT AT ISSUE ON COMPETITION IS ASSESSSED, WITH A FINDING OF AN ANTITRUST VIOLATION REQUIRED IF THE ACTION HAS AN ADVERSE IMPACT ON COMPETITION.

MUNICIPAL DECISION-MAKING AUTHORITY WILL BE SUBSTANTIALLY CURTAILED IF THE EXISTING RULE OF REASON STANDARDS ARE APPLIED. UNDER THE RULE OF REASON STANDARDS ESTABLISHED BY THE SUPREME COURT IN NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS V. UNITED STATES, 435 U.S. 679 (1978), THE CONSIDERATION OF FACTORS SUCH AS "TRADITIONAL HEALTH, SAFETY, AND PUBLIC WELFARE CONCERNS," HAS BEEN PROHIBITED, WITH REVIEW STRICTLY LIMITED TO THE IMPACT OF THE CHALLENGED ACTION ON COMPETITION. IN THE UNITY VENTURES CASE, THE JUDGE SPECIFICALLY INSTRUCTED THE JURY ON THE BASIS OF THE PROFESSIONAL ENGINEERS STANDARD, PROHIBITING IT FROM

CONSIDERING ANY BENEFITS WHICH MAY HAVE ACCRUED TO THE PUBLIC AS A RESULT OF THE GOVERNMENT'S ACTIONS IN THAT CASE.

TREBLE DAMAGES. BOTH THE BOULDER DECISION AND THE SUPREME COURT'S RULING IN CITY OF LAFAYETTE V. LOUISIANA POWER AND LIGHT CO., 435 U.S. 389 (1978), INCLUDED LANGUAGE SUGGESTING THAT THE CITIES MAY NOT BE REQUIRED TO PAY TREBLE DAMAGES UNDER THE ANTITRUST LAWS. JUSTICE REHNQUIST, HOWEVER, IN A DISSENTING OPINION IN THE BOULDER CASE, SUGGESTED THAT THE COURTS WILL NOT HAVE SUCH DISCRETION, AS THE REMEDY OF TREBLE DAMAGES IS MANDATORY UNDER SECTION FOUR OF THE CLAYTON ACT: "ANY PERSON WHO SHALL BE INJURED IN HIS BUSINESS OR PROPERTY BY REASON OF ANYTHING FORBIDDEN IN THE ANTITRUST LAWS... SHALL RECOVER THREEFOLD THE DAMAGES BY HIM SUSTAINED."

VULNERABLE MUNICIPAL ACTIVITIES. A WIDE RANGE OF MUNICIPAL ACTIVITIES, BECAUSE OF THEIR IMPACT ON COMPETITION, ARE VULNERABLE TO ANTITRUST CHALLENGE. MUNICIPAL ACTIVITIES, WHICH HAVE ALREADY BEEN THE TARGET OF ANTITRUST LITIGATION, INCLUDE LAND USE REGULATION, PROCUREMENT PRACTICES, FRANCHISING AND LICENSING PRACTICES, WASTE COLLECTION AND DISPOSAL, THE PROVISION OF HOSPITAL AND AMBULANCE SERVICE, AND THE OPERATION OF AIRPORTS AND PORTS. IN FACT, THE UNITY VENTURES CASE, RESULTING IN A TREBLE DAMAGES AWARD OF $28.5 MILLION AGAINST TWO LOCAL GOVERNMENTS AND SEVERAL ELECTED OFFICIALS IN A SUIT OVER DEVELOPMENT RIGHTS AND SEWAGE TREATMENT PERMITS, IS INDISPUTABLE EVIDENCE OF THE ESSENTIAL GOVERNMENTAL ACTIVITIES WHICH ARE NOW VULNERABLE UNDER THE ANTITRUST LAWS.

JUSTICE REHNQUIST SUGGESTED IN HIS DISSENTING OPINION IN THE BOULDER CASE THAT "A MUNICIPALITY WOULD VIOLATE THE SHERMAN ACT BY ENACTING RESTRICTIVE ZONING ORDINANCES, BY REQUIRING BUSINESS AND OCCUPATIONAL LICENSES, AND BY GRANTING EXCLUSIVE FRANCHISES TO UTILITY SERVICES" UNLESS THE COURTS DEVELOP A RULE OF REASON UNDER WHICH ANTICOMPETITIVE MUNICIPAL ACTIONS ARE PERMITTED WHENEVER THE PUBLIC BENEFITS AS A RESULT OF THE CITY'S ACTION.

NLC'S POSITION

THE ANTITRUST LAWS REFLECT A DETERMINATION BY CONGRESS THAT THE PROTECTION AND ENHANCEMENT OF COMPETITION ARE FUNDAMENTAL NATIONAL POLICY OBJECTIVES. IT IS OUR VIEW THAT IT IS CONGRESS'S DUTY TO APPLY THE ANTITRUST LAWS IN A UNIFORM AND RESPONSIBLE FASHION, TAKING INTO ACCOUNT SUCH MATTERS AS THE IMPACT OF THE ANTITRUST LAWS ON LOCAL GOVERNMENT. WE DO NOT BELIEVE THAT IT IS NECESSARY TO SUBJECT CITIES TO ANTITRUST LIABILITY IN ORDER TO PROTECT AND ENHANCE COMPETITION. PRIOR TO THE SUPREME COURT'S 1982 DECISION IN THE BOULDER CASE TO SUBJECT CITIES TO THE ANTITRUST LAWS, THE ACTIVITIES OF CITIES WERE NOT REGARDED AS MAJOR OBSTACLES TO REALIZATION OF THESE OBJECTIVES.

IN VIEW OF THE SERIOUS THREAT TO THE ABILITY OF LOCAL GOVERNMENTS TO GOVERN REPRESENTED BY THE BOULDER CASE, NLC STONGLY URGES CONGRESS TO AMEND THE ANTITRUST LAWS TO ESTABLISH A MUNICIPAL ACTION EXEMPTION WHICH PARALLELS THAT OF THE STATES UNDER THE PARKER STATE ACTION EXEMPTION. IN OTHER WORDS, MUNICIPAL ACTIONS SHOULD BE EXEMPT FROM ANTITRUST CHALLENGE IF A MUNICIPALITY ESTABLISHES A POLICY OF SUBSTITUTING REGULATION OR MONOPOLY PUBLIC SERVICE FOR COMPETITION AND SUPERVISES THE IMPLEMENTATION OF THAT POLICY.

IT IS CLEARLY CONGRESS'S RESPONSIBILITY, RATHER THAN THAT OF THE COURTS AND THE STATE LEGISLATURES, TO CORRECT THE MANY PROBLEMS CREATED BY THE BOULDER RULING. UNDER CURRENT CASE LAW, WE DO NOT BELIEVE THAT IT IS EVEN POSSIBLE FOR THE STATES TO PROVIDE CLEAR PROTECTION FOR CITIES FROM ANTITRUST LIABILITY. BECAUSE THE COURTS HAVE NOT ESTABLISHED CLEAR GROUND RULES FOR THE ENACTMENT OF PROTECTIVE STATE LEGISLATION, ANY STATE LEGISLATION ENACTED IS LIKELY TO BE CHALLENGED IN THE COURTS, MAKING THE PROTECTION FOR CITIES ILLUSORY.

EVEN MORE TROUBLESOME IS THE PROPOSAL, SUPPORTED BY THE NATIONAL CONFERENCE OF STATE LEGISLATURES, FOR ENACTMENT OF AN AMENDMENT TO THE ANTITRUST LAWS UNDER WHICH THE STATES WOULD BE AUTHORIZED TO DELEGATE ANTITRUST IMMUNITY TO CITIES AND COUNTIES ON THE BASIS OF BROAD GUIDELINES ESTABLISHED BY THE CONGRESS. SUCH AN APPROACH WOULD RESULT IN WIDELY VARYING ANTITRUST POLICY FROM STATE TO STATE, WITH SOME STATES ELECTING NOT TO PASS THE NECESSARY STATE LEGISLATION, OTHERS ESTABLISHING ONLY LIMITED ANTITRUST PROTECTIONS, AND STILL OTHERS PROVIDING RELATIVELY BROAD ANTITRUST PROECTIONS FOR CITIES.

MOREOVER, THIS PROPOSAL WOULD INAPPROPRIATELY INVOLVE THE FEDERAL GOVERNMENT IN THE RELATIONSHIP BETWEEN THE STATES AND SUBSTATE ENTITIES, EFFECTIVELY DICTATING HOW THE STATES SHOULD DELEGATE AUTHORITY TO LOCAL GOVERNMENTS. WE BELIEVE THAT SUCH AN APPROACH WOULD RAISE SIGNIFICANT TENTH AMENDMENT ISSUES AS IT WOULD RESULT IN FEDERAL INTRUSION INTO A MATTER OF LONG-STANDING STATE CONCERN -- HOW GOVERNMENTAL AUTHORITY IS ALLOCATED WITHIN A STATE.

THE LOCAL GOVERNMENT ANTITRUST ACT OF 1983 (S. 1578)

WE BELIEVE THAT S. 1578 REPRESENTS AN EXCELLENT STARTING POINT FOR THE ESTABLISHMENT OF A MUNICIPAL ACTION EXEMPTION. GENERALLY, IT TAKES THE APPROACH TO THE ISSUE WHICH WE HAVE ADVOCATED: A CITY SHOULD BE EXEMPT FROM ANTITRUST LIABILITY UNLESS THE ANTITRUST LAWS WOULD APPLY TO "A SIMILAR LAW OR ACTION OF ... A STATE."

A NUMBER OF REVISIONS ARE NECESSARY, HOWEVER, TO ENSURE THAT CITIES HAVE ADEQUATE PROTECTION.

FIRST, THE EXEMPTION SHOULD APPLY TO ANY ACTION TAKEN BY A CITY. S. 1578 WOULD EXEMPT ONLY ACTIONS BY A LOCAL GOVERNMENT WHICH ARE "THE EXERCISE OF ITS REGULATORY POWERS, INCLUDING BUT NOT LIMITED TO ZONING, FRANCHISING, LICENSING, AND THE ESTABLISHMENT OF MONOPOLY PUBLIC SERVICES." THIS LANGUAGE APPEARS TO ATTEMPT TO

DELINEATE THE DIFFERENCE BETWEEN GOVERNMENTAL AND PROPRIETARY ACTIONS, A DISTINCTION WHICH CANNOT BE MADE, GIVEN THE CONSTANTLY CHANGING NATURE OF GOVERNMENTAL RESPONIBILITIES AND THE DIFFICULTIES THE COURTS HAVE ENCOUNTERED IN MAKING DISTINCTIONS BETWEEN GOVERNMENTAL AND PROPRIETARY ACTIVITIES IN THE TORTS AREA.

FOR EXAMPLE, WOULD A DECISION TO GRANT AN URBAN DEVELOPMENT ACTION GRANT BE REGARDED AS AN EXERCISE OF A CITY'S REGULATORY POWERS? WHAT ABOUT THE ISSUANCE OF AN INDUSTRIAL REVENUE BOND? WE BELIEVE THESE ACTIVITIES, AS WELL AS A NUMBER OF SIMILAR ACTIVITIES, ARE AN ESSENTIAL PART OF ESTABLISHING PUBLIC POLICY AT THE LOCAL LEVEL AND SHOULD BE PROTECTED FORM ANTITRUST CHALLENGE.

SECOND, THE EXEMPTION SHOULD APPLY TO THE CITY OFFICIALS WHO ARE RESPONSIBLE FOR DEVELOPING AND IMPLEMENTING MUNICIPAL POLICY AS WELL AS THE GOVERNMENTAL ENTITY. S. 1578 WOULD NOT SPECIFICALLY EXEMPT CITY OFFICIALS FROM LIABILITY. SUCH PROTECTION IS AT LEAST AS IMPORTANT AS PROTECTION FOR THE GOVERNMENT IN ORDER TO ENSURE THE ABILITY TO GOVERN AT THE LOCAL LEVEL.

THIRD, SPECIAL PURPOSE UNITS OF GOVERNMENT (E.G., SANITATION DISTRICTS, TRANSIT AUTHORITIES) SHOULD BE EXEMPT FROM ANTITRUST LIABILITY AS WELL AS GENERAL PURPOSE UNITS OF GOVERNMENT. IN MANY CASES, SPECIAL PURPOSE UNITS OF GOVERNMENT PLAY A CENTRAL ROLE IN THE DEVELOPMENT AND IMPLEMENTATION OF LOCAL POLICY AND ARE NECESSARY FOR REGIONAL COOPERATION (E.G., REGIONAL AIRPORTS AND METROPOLITAN TRANSIT SYSTEMS).

FOURTH, S. 1578 WOULD NOT EXEMPT FROM ANTITRUST LIABILITY "ANY ACTIVITY INVOLVING THE SALE OF GOODS OR SERVICES IN COMPETITION WITH PRIVATE PERSONS." WE BELIEVE THAT THERE ARE MANY CASES WHEN A CITY IS FORCED TO PROVIDE PARTICULAR SERVICES OR GOODS BECAUSE THE PRIVATE SECTOR IS NOT MEETING ALL OF THE PUBLIC NEEDS FOR CERTAIN SERVICES OR GOODS. ONE SUCH ACTIVITY WHICH COMES READILY TO MIND IS THE OPERATION OF PUBLIC HOSPITALS AND OTHER PUBLIC

HEALTH CARE FACILITIES. CITIES DO NOT ELECT TO PROVIDE SUCH SERVICES IN ORDER TO DEPRIVE THE PRIVATE SECTOR OF A LUCRATIVE BUSINESS. CITIES ASSUME SUCH RESPONSIBILITIES WHEN THE PRIVATE SECTOR HAS FAILED TO MEET BASIC COMMUNITY NEEDS FOR SERVICE. IT DOES NOT SEEM EITHER APPROPRIATE OR NECESSARY TO SUBJECT A CITY TO POTENTIAL ANTITRUST LIABILITY IN SUCH CASES.

FIFTH, S. 1578 SHOULD BE REVISED TO PROHIBIT THE AWARDING OF DAMAGES IN ALL CASES INVOLVING THE CITY OR ITS OFFICIALS. THERE ARE NO CIRCUMSTANCES IN WHICH IT IS APPROPRIATE TO REQUIRE THE PAYMENT OF DAMAGES BY A CITY TO A PRIVATE PARTY UNDER THE ANTITRUST LAWS. EVEN THE PAYMENT OF LIMITED DAMAGES COULD BANKRUPT A CITY AND/OR IMPOSE AN EXTRAORDINARY PENALTY ON THE COMMUNITY'S TAXPAYERS. WE DO NOT BELIEVE THAT THERE IS ANY EVIDENCE THAT SUCH STRONG MEDICINE IS NECESSARY IN THIS AREA.

CONCLUSION

THE TIME HAS COME FOR CONGRESS TO ENACT LEGISLATION WHICH WOULD PROTECT CITIES FROM ANTITRUST LIABILITY. WE DO NOT BELIEVE THAT A MATTER OF SUCH FUNDAMENTAL IMPORTANCE TO EVERY CITY IN THE NATION SHOULD BE LEFT TO THE COURTS OR THE STATE LEGISLATURES. THE ANTITRUST LAWS ARE A CREATION OF CONGRESS AND, CONSEQUENTLY, CONGRESS HAS THE OBLIGATION TO CORRECT THE PROBLEM. THE FEDERAL ANTITRUST LAWS REPRESENT NATIONAL POLICY WHICH SHOULD BE APPLIED UNIFORMLY THROUGHOUT THE NATION.

IT IS OUR VIEW THAT CITIES SHOULD HAVE AN EXEMPTION SIMILAR TO THAT OF THE STATES. THE STATES ARE PROTECTED FROM ANITITRUST LIABILITY WHENEVER THEY ESTABLISH AN AFFIRMATIVE POLICY OF DISPLACING COMPETITION WITH REGULATION OR MONOPOLY PUBLIC SERVICE. WE SEE NO REASON FOR TREATING CITIES ANY DIFFERENTLY FROM STATES.

WE URGE THAT THE COMMITTEE ACT PROMPTLY ON LEGISLATION WHICH WILL ENSURE THAT CITIES HAVE THE ABILITY TO FULFILL THEIR NUMEROUS PUBLIC RESPONSIBILITES WITHOUT FEAR OF ANTITRUST LIABILITY.

The CHAIRMAN. We will now hear from Mr. Leventis.

Mr. LEVENTIS. With your permission, Mr. Chairman, I would appreciate the opportunity to stand and deliver the statement I have prepared and ask also, if you would, please, to record for the record the statement that we passed up on behalf of the National Association of Counties.

The CHAIRMAN. We will put in the record your entire statement representing the Richland County Council and also the statement on behalf of the National Association of Counties. You may make such remarks as you care to in connection with them.

Mr. LEVENTIS. As you indicated, I am representing Richland County, SC, and the National Association of Counties. I am also serving as chairman of the county council this year.

Our statement addresses our role as public servant. You have previously received testimony, and I assume you have documents on file from the legal profession, that will address the legal questions involved.

Today, if I might, I would like to present testimony on behalf of the public servants, the elected officials, and I am not appearing in the role of an attorney although I do practice law as a member of the South Carolina Bar.

First of all, Mr. Chairman, let me mention to you that it is our association's view that the dramatic expansion of antitrust liability to cover local government in the wake of the decisions that have been mentioned here today is clearly contrary to what we believe Congress intended when the Sherman Antitrust Act was originally enacted in 1890. We do not believe this expansion of liability expresses Congress' present intentions.

We think it is imperative that Congress clarify its interpretation of its own laws rather than allowing them to be subject to unbridled Supreme Court interpretation.

We seek the same protection enjoyed by the States. As mentioned earlier by Mayor Riley, all we are asking is that Congress extend to local governments and other governmental entities the same protection extended to the States so long as they act within State law.

We also feel that local officials need to be protected from monetary damages. We are not requesting that other Federal laws be changed in any respect. We realize we can still be sued under section 1983, under the Sunshine Laws and State antitrust laws. The suits that we have experienced in South Carolina and in Richland County, which are minimal, have been 1983 suits.

We know that, as local officials, we do not have a free hand to operate improperly or to willfully displace competition in the private marketplace. Since the 1982 *Boulder* decision more than 200 Federal antitrust cases have been reported and, most recently, Lake County, IL, received a judgment of $28.5 million which was greater than the annual budget of our county. The entire budget of Richland County, which is approximately $26 million.

The attorneys' fees in these cases are significant. We know local governments, as in our case, do not always have on their staff a civil attorney who can handle the questions that are involved, and it requires us to go out for specialized legal counsel.

Incidently, I flew in this morning with one of your former associates, General Sneeden, who is a person in our community who practices in the antitrust area. We do have antitrust lawyers in South Carolina, but that type of litigation is expensive and it costs the taxpayers, the public, sizable sums which we cannot afford to pay even if we win.

The fear of suit on behalf of local elected officials, possibly causes us to postpone tough decisions and perhaps even not make them at all. We know that local governments can suffer from this fear of decisionmaking that often leads to poor public policy.

The *Boulder* decision has had a devastating impact on home rule. The requirements for supervision by the State cuts into local decisionmaking and control and has had an adverse effect on multijurisdictional cooperation.

As you know, Senator, in South Carolina, we have come a long way since the days of the supply bill and delegation rule, and your days as Governor and State senator saw you participating in the growth of local government. We know home rule is of major concern to counties across the country. In South Carolina it is a legal requirement that has been brought about after much study and debate and after our State Constitution adopted in 1885 was changed so that home rule could be a part of local government. At the time of this change, Governor Riley was a State senator and worked very hard in support of the home rule movement

But this *Boulder* decision has made it clear that even home rule jurisdictions enjoy no special protection from antitrust litigation. We do not say this to imply that home rule governments are the only jurisdictions to be protected. We seek protection for all local entities of government, but we emphasize the recent rulings to emphasize the absurdity of recent court rulings as they affect the home-rule movement in our country and good government in general.

I am sure you are aware that the three Justices who dissented, who might be considered strict constructionists, felt that the decision in *Boulder* effectively destroyed the home rule movement in our country.

It is a fact that in South Carolina almost 60 percent of our counties have chosen to form a council administrator form of government, and we are pleased and gratified that the local elected officials have continued to improve in their decisionmaking process and in their ability to serve at the local level. The State government has given more and more responsibility to the local governments, and we are the administrative extension of the State government and operate closest to the people in their behalf.

We know that this growth of antitrust liability threatens to disrupt the years of progress that have been made in the intergovernmental area.

Senator, in the statement that we have prepared, we comment on Senate bill 1578. We want to thank you for the initiative that you have taken to draft this legislation and the other Senators who joined with you to cosponsor the legislation and to promote it in the Senate.

We know that as we go about our daily functions, which you mentioned in the Congressional Record, that there are fears that we would have these paralyzing antitrust lawsuits which might harm us in our ability to go forward in a constructive way for our local constituents.

We would like to ask you to consider several amendments, however, in your proposal that we believe would strengthen the legislation.

First we think that local government officials who are not presently covered under your proposal should also be included, and that all governmental entities, whether they be general purpose or special purpose, should be included.

The counties urge that you amend your bill, Senate bill 1578, so that Congress does not codify a destinction between what is termed governmental and proprietary. We are concerned that the definition of those activities either in the court or by statute is something that is difficult at best to do and probably would raise more doubt than we have at present. We do not think it should be codified in the statute. We actually do not believe a clear distinction can be drawn between that which is truly governmental and that which is proprietary.

You are aware of the ambulance service that was operated by our local morticians. Being unable to operate adequately, the county had no choice in providing this service in order to protect the health and welfare of its citizens. In fact, the ambulance system is now owned by the county government. We know under the definition of governmental or proprietary that perhaps a private purveyor of this service might decide to provide the service and then the question arises is it proprietary or governmental?

Finally, there is the question of damages. Your local government antitrust act of 1983 does not presently provide for limitation on damages in the areas which would remain subject to suit. They have been addressed earlier, and I think all parties present have agreed that we should retain injunctive relief and eliminate monetary relief in those areas which would remain subject to suit.

You mentioned to your distinguished colleague when you introduced this legislation this question which we think is the heart of the whole matter—"are there sufficient and compelling reasons to treat the legitimate activities of local governments differently from those of State governments under the antitrust laws?"

You answered, "within reasonable limitations, I believe, the answer to this question is no." Your response recognizes the unique relationship between State and local government.

We officials recognize that the counties are not State government, but we also realize our actions and our activities are on behalf of the State government. We do not seek any different treatment than that which is given to the State government if the State government itself had taken the action so long as we are empowered by the State or through enabling legislation.

The courts have interpreted Federal antitrust laws in a manner that skews the traditional relationship between State and local government and clearly Congress must put it right.

Senator, we are very grateful to you and the committee for conducting hearings on this matter which is of such urgency to local governments. We thank you for your continued leadership, and we are delighted to work with you in any way possible to assist in the enactment of legislation which restores the balance and enhances appropriate public policy throughout this country.

I appreciate the opportunity to be here, and I would be delighted to answer any questions you might have, sir.

The CHAIRMAN. Mr. Leventis, Mr. McGrath suggested a change in S. 1578 regarding the circumstances under which a local government could be liable under the antitrust laws for engaging in commercial activity.

What is your reaction to his suggestion?

Mr. LEVENTIS. Senator, we feel we should not try in a statutory form to define governmental and proprietary activities. We think that there is no clear definition. Moreover, by whom will it be decided?

The example of the ambulance service I just described demonstrates why proprietary or governmental activities are not always distinguishable. We would prefer that it not be defined in such a fashion but that it be left to the same standard applied to the States. In other words immunity would be granted to local government if it would be provided to the State government.

The CHAIRMAN. Mr. Leventis, you operate under home rule in Richland County, do you not?

Mr. LEVENTIS. Yes, sir.

The CHAIRMAN. Which is the home county of the State Capital of South Carolina, the best State in the Nation.

Would it be possible for Richland County to receive from the State necessary authorization without relinquishing most or all of its home rule powers?

Mr. LEVENTIS. I do not think it would, Senator. We have so many requirements we need to go to the State for now, and the relationship between the State and local government is more important every day. We do not always agree with State government, but they have granted home rule authority and we feel as long as we act appropriately within that home rule authority, we should receive the same protection the State receives.

Incidentally, Senator Durenberger mentioned that all of us from South Carolina were seated here in the front row. I told him that my mother was from Minnesota. So he was part of our family also.

One of the appeals that we would make about this legislation is that we need to have responsible local citizens active in local government. That is the heartbeat of government at the Federal, State, and local level.

The legislative changes which you are addressing in your bill, Senator, need to be clarified so that the affected official at home in South Carolina, or anywhere across this country, can feel comfortable if he or she runs for public office and properly performs the duties of the office. Elected officials must serve without fear of exposure to the antitrust laws which we have today. We want those people to serve our government without fear that their families might be exposed to a personal liability.

The CHAIRMAN. Under the present situation, people in a community of just a few hundred might be subjected to a judgment of millions of dollars. Is that not right?

Mr. LEVENTIS. There is no question about that.

The **Chairman**. You have a city of 6,000 people with a judgment of over $28 million?

Mr. **Leventis**. Which is more than our county budget.

The **Chairman**. This matter is certainly deserving of prompt action by the Congress, it seems to me.

Mr. **Leventis**. We would appreciate that.

The **Chairman**. We thank you very much for your fine contribution. We appreciate your coming up and testifying here on this occasion. Feel free to stay as long as you wish or you may be excused, if you desire to leave.

We are pleased to have your attractive sister, Ms. Paul, with us.

[Prepared statement follows:]

STATEMENT OF THE HONORABLE JAMES C. LEVENTIS, CHAIRMAN, RICHLAND COUNTY COUNCIL, SOUTH CAROLINA, ON BEHALF OF THE NATIONAL ASSOCIATION OF COUNTIES, BEFORE THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, ON MUNICIPAL ANTITRUST LIABILITY

CHAIRMAN THURMOND, AND DISTINGUISHED MEMBERS OF THIS COMMITTEE, I AM JAMES C. LEVENTIS. I HAVE SERVED ON THE RICHLAND COUNTY COUNCIL FOR THE PAST EIGHT YEARS, AND I AM PRESENTLY CHAIRMAN OF THE COUNTY COUNCIL. I SERVE AS THE CHAIRMAN OF THE CENTRAL MIDLANDS REGIONAL PLANNING COUNCIL AND, I AM A MEMBER OF THE BOARD OF DIRECTORS OF THE SOUTH CAROLINA ASSOCIATION OF COUNTIES. IN ADDITION TO MY RESPONSIBILITIES AS A PUBLIC SERVANT, I AM ALSO A PRACTICING ATTORNEY AND A MEMBER OF THE SOUTH CAROLINA BAR ASSOCIATION.

I AM PLEASED TO APPEAR THIS AFTERNOON TO PRESENT TESTIMONY ON BEHALF OF THE NATIONAL ASSOCIATION OF COUNTIES (NACo)* ON LEGISLATION WHICH WOULD LIMIT THE LIABILITY OF LOCAL GOVERNMENTS UNDER FEDERAL ANTITRUST LAW.

MY TESTIMONY DOES NOT DELVE INTO THE LEGAL NUANCES OR RAMIFICATIONS OF IMMUNITY LEGISLATION. I AM CONFIDENT THAT YOU HAVE ALREADY REVIEWED VOLUMINOUS MATERIAL ON THE LEGAL QUESTIONS AT HAND. I AM HERE TO SPEAK TO YOU AS ONE ELECTED OFFICIAL TO ANOTHER, AND TO IMPART A VERY IMPORTANT MESSAGE FROM LOCAL ELECTED OFFICIALS ACROSS THE COUNTRY. THAT MESSAGE IS SIMPLE. LOCAL GOVERNMENT OFFICIALS CAN NO LONGER EFFECTIVELY GOVERN UNDER THE WEIGHT OF THE BOULDER DECISION. WE DESPERATELY NEED PROTECTION. LOCAL OFFICIALS LOOK TO CONGRESS FOR THAT PROTECTION. IN OUR JUDGMENT, CONGRESS IS THE MOST APPROPRIATE BODY TO INTERPRET ITS OWN LAWS, AND TO CLARIFY THE APPLICATION OF THESE LAWS WITHIN THE INTERGOVERNMENTAL SYSTEM.

THE CASE FOR IMMUNITY

RICHLAND COUNTY ENCOMPASSES 762 SQUARE LAND MILES. LOCATED WITHIN OUR COUNTY IS THE STATE CAPITOL CITY, COLUMBIA. THE COUNTY SERVES MORE

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*NACo IS THE ONLY NATIONAL ORGANIZATION REPRESENTING COUNTY GOVERNMENT IN AMERICA. ITS MEMBERSHIP INCLUDES URBAN, SUBURBAN AND RURAL COUNTIES JOINED TOGETHER FOR THE COMMON PURPOSE OF STRENGTHENING COUNTY GOVERNMENT TO MEET THE NEEDS OF ALL AMERICANS. BY VIRTUE OF A COUNTY'S MEMBERSHIP, ALL ITS ELECTED AND APPOINTED OFFICIALS BECOME PARTICIPANTS IN AN ORGANIZATION DEDICATED TO THE FOLLOWING GOALS: IMPROVING COUNTY GOVERNMENT; ACTING AS LIAISON BETWEEN THE NATION'S COUNTIES AND OTHER LEVELS OF GOVERNMENT; AND ACHIEVING THE PUBLIC UNDERSTANDING OF THE ROLE OF COUNTIES IN THE FEDERAL SYSTEM.

THAN 250,000 PEOPLE. OUR ANNUAL BUDGET IS NEARLY $26 MILLION. OF THAT AMOUNT, THE COUNTY PROPERTY TAX RAISES $7.3 MILLION OR 28.7 PERCENT. WE RECEIVE $3.7 MILLION IN GENERAL REVENUE SHARING: $6.2 MILLION FROM THE STATE GOVERNMENT, AND $1.3 MILLION IS RAISED BY INTEREST EARNED THROUGH OUR COUNTY'S CASH MANAGEMENT PROGRAM.

IN 1976, OUR STATE IMPLEMENTED "THE LOCAL GOVERNMENT ACT OF 1975" WHICH PROVIDED HOME RULE AUTHORITY FOR LOCAL GOVERNMENTS. IN 1977, RICHLAND COUNTY ADOPTED ITS OWN HOME RULE CHARTER WITH A COUNCIL/ADMINISTRATOR FORM OF GOVERNMENT. TWENTY-NINE, OR 63 PERCENT, OF THE FORTY-SIX COUNTIES IN THE STATE HAVE ADOPTED THIS FORM OF HOME RULE GOVERNMENT.

BECAUSE OF OUR HOME RULE STATUS, RICHLAND COUNTY PROVIDES A BROAD ARRAY OF SERVICES TO ITS CITIZENS. THESE INCLUDE THE PROVISION OF WATER AND WASTEWATER TREATMENT, SOCIAL SERVICES PROGRAMS, AND A NUMBER OF HEALTH AND PUBLIC SAFETY PROGRAMS. WE OPERATE A COUNTY AMBULANCE SYSTEM, A COUNTY AIRPORT, AND A COUNTY LANDFILL. IN THE MORE RURAL AREAS OF THE COUNTY, WE OPERATE WHAT WE TERM "GREENBOXES" AS OPPOSED TO CURBSIDE GARBAGE COLLECTION PICKUP. THIS SYSTEM RELIES ON CENTRALLY ACCESSIBLE CONTAINERS WHICH ARE MAINTAINED BY THE COUNTY. THE COUNTY AIRPORT, OWENS FIELD, IS FAR TOO SMALL TO SERVE THE COUNTY AREA. CONSEQUENTLY, RICHLAND COUNTY HAS ENTERED INTO AN AGREEMENT WITH SEVERAL OTHER JURISDICTIONS AND IS A MEMBER OF AN INDEPENDENT AUTHORITY WHICH OPERATES THE COLUMBIA METROPOLITAN AIRPORT.

IN ADDITION TO THE OUTRIGHT OPERATION OR OWNERSHIP OF THESE SERVICES, RICHLAND COUNTY ALSO REGULATES TO ENSURE THE HEALTH AND SAFETY OF OUR CITIZENS. THESE REGULATORY POWERS INCLUDE THE FRANCHISING OF CABLE TELEVISION, AND LICENSING OF LOCAL PEDDLERS. WE ALSO REGULATE THE USE OF LAND THROUGH LAND USE ZONING AND PERMIT SYSTEMS.

FOR MANY OF THE SERVICES I HAVE JUST LISTED, THE COUNTY IS SUBJECT TO SUIT UNDER FEDERAL ANTITRUST LAW. THESE ARE JUST A FEW OF THE AREAS THAT HAVE THE POTENTIAL FOR SUIT.

IN ADDITION, DECISIONS LOCAL OFFICIALS MAKE IN IMPLEMENTING ECONOMIC OR COMMUNITY DEVELOPMENT PROGRAMS HAVE THE POTENTIAL FOR ANTITRUST SUIT. LET ME PROVIDE AN EXAMPLE. IN AN ATTEMPT TO REVITALIZE A DOWNTOWN AREA, A COUNTY BOARD DEVELOPS A DOWNTOWN ECONOMIC DEVELOPMENT PLAN, AND WORKS WITH ITS SMALL BUSINESSES TO PROVIDE OR OBTAIN LOW INTEREST LOANS SO THEY MAY MODERNIZE THEIR STOREFRONTS. THE BOARD APPLIES COMMUNITY DEVELOPMENT FUNDS TO BUILD PARKING GARAGES, AND CLOSES OFF CERTAIN STREETS TO MAKE

DOWNTOWN SHOPPING MORE ATTRACTIVE TO LOCAL RESIDENTS. LARGE SUMS OF FEDERAL AND STATE MONIES ARE INVOLVED. A LOCAL BOND IS ISSUED. THE PROJECT HAS THE SANCTION OF THE LOCAL CITIZENS THROUGH PUBLIC HEARINGS AND THE LOCAL BOND REFERENDUM. AFTER ALL THIS INVESTMENT, A DEVELOPER DECIDES TO BUILD A LARGE SHOPPING MALL OUTSIDE THE DOWNTOWN AREA. A NUMBER OF MALLS ALREADY EXIST. THE ADDITION OF ANOTHER WOULD PROVIDE ECONOMIC HARM TO EXISTING MALLS, AND WOULD TOTALLY UNDERMINE THE DOWNTOWN DEVELOPMENT PROJECT.

ACTING ON WHAT IS BEST FOR THE COMMUNITY AS A WHOLE, THE COUNTY BOARD, AFTER A FULL AND OPEN HEARING, DENIES THE ZONING REQUEST, OR REFUSES TO GRANT A BUILDING PERMIT. SHORTLY THEREAFTER, THE BOARD FACES ANTITRUST SUIT, ENORMOUS LEGAL COSTS FOR ITS DEFENSE, AND PERSONAL LIABILITY.

WHILE THE DEVELOPER MAY NOT WIN HIS SUIT, THE FACT THAT HE FILED SUCH A SUIT STYMIES THE LOCAL DECISIONMAKING PROCESS, FRIGHTENS THE LOCAL OFFICIALS, AND INVOLVES UNTOLD HOURS IN PLANNING THE COUNTY'S DEFENSE. AN OUTSIDE ATTORNEY IS HIRED BECAUSE THE COUNTY CIVIL ATTORNEY HAS NO EXPERIENCE IN THE ANTITRUST AREA. BEFORE THE SUIT IS OVER, THE COUNTY HAS EITHER PAID HUNDREDS OF THOUSANDS OF DOLLARS IN ITS LEGAL DEFENSE, OR HAS SETTLED OUT OF COURT AN AMOUNT THAT SERIOUSLY STRAINS AN ALREADY STRAPPED COUNTY TREASURY. MORE IMPORTANTLY, HOWEVER FRIVOLOUS, THE SUIT HAS FRUSTRATED THE IMPLEMENTATION OF PUBLIC POLICY.

THIS EXAMPLE IS NOT FANTASY. IT IS HAPPENING IN COUNTIES THROUGHOUT THE COUNTRY. THE OFFICIALS HAVE NOT ACTED IMPROPERLY. LIKE YOU, THEY ARE DEDICATED PUBLIC SERVANTS ATTEMPTING TO GOVERN IN THE BEST INTERESTS OF THEIR CITIZENS. MANY ARE PART-TIME, AND SOME ARE UNPAID. THEY ARE NOT CONSPIRING TO DISPLACE COMPETITION FOR THEIR OWN, OR ANY ONE INDIVIDUAL'S BENEFIT. RATHER, THEY SIMPLY ARE TRYING TO BE RESPONSIBLE PUBLIC SERVANTS TO ENSURE THAT THEIR COMMUNITY PROVIDES OPPORTUNITIES FOR ALL ITS RESIDENTS, AND FOR THE COMMUNITY AS A WHOLE.

THE MOST RECENT CASE IS A GOOD EXAMPLE OF THE APPLICATION OF ANTITRUST LAW GONE HAYWIRE. IN A COMPLEX DISPUTE INVOLVING DEVELOPMENT RIGHTS AND ACCESS TO A REGIONAL SEWER SYSTEM, LAKE COUNTY, ILLINOIS AND THE VILLAGE OF GRAYSLAKE ALONG WITH SEVERAL LOCAL ELECTED OFFICIALS, HAVE BEEN FOUND LIABLE UNDER THE FEDERAL ANTITRUST STATUTES FOR $28.5 MILLION.

THE ACTUAL JURY AWARD IN THE CASE WAS $9.5 MILLION, BUT THE JUDGE APPLIED THE MANDATORY TREBLE DAMAGE PROVISION OF FEDERAL ANTITRUST STATUTES AND INCREASED THE AWARD TO $28.5 MILLION.

IN THE WAKE OF THE U.S. SUPREME COURT DECISION IN COMMUNITY COMMUNICATIONS v. BOULDER, THE AWARD REPRESENTED THE FIRST TIME THAT MONETARY DAMAGES WERE ASSESSED AGAINST A LOCAL GOVERNMENT UNDER THE FEDERAL ANTITRUST STATUTES.

THE ILLINOIS CASE, UNITY VENTURES v. VILLAGE OF GRAYSLAKE WAS BROUGHT BY A DEVELOPER WHO CLAIMED HE WAS UNLAWFULLY DENIED ACCESS TO A SEWER INTERCEPTOR WHEN THE VILLAGE ALLEGEDLY FAILED TO HONOR THE DEVELOPER'S REQUEST.

THE COUNTY HAD ENTERED INTO A "SPHERE OF INFLUENCE" AGREEMENT WITH THE VILLAGE OF GRAYSLAKE IN IMPLEMENTING A REGIONAL SEWER SYSTEM. THE SPHERE OF INFLUENCE AGREEMENT WAS UTILIZED TO IMPLEMENT REGIONAL WATER SYSTEMS AND TO PROMOTE LAND USE AND GROWTH MANAGEMENT POLICIES ON A REGIONAL BASIS.

LAKE COUNTY'S POPULATION IS ABOUT 440,000: THE COUNTY BUDGET IS $85.7 MILLION OF WHICH $19.5 MILLION COMES FROM THE PROPERTY TAX. GENERALLY, THE PROPERTY TAX IS THE ONLY DISCRETIONARY POOL OF FUNDS FROM WHICH JUDGMENTS CAN BE PAID.

THE OFFICIALS OF GRAYSLAKE AND LAKE COUNTY DID NOT ACT IMPROPERLY THEY DID NOT CONSPIRE TO RESTRAIN COMPETITION IN ANY INTENTIONAL OR MALICIOUS ACTION, NOR DID THEY GAIN PERSONALLY OR ATTEMPT TO HELP A FRIEND. WE IN COUNTY GOVERNMENT DO NOT CONDONE ANY IMPROPER ACTIVITY. WE ARE NOT SEEKING IMMUNITY TO PROVIDE PROTECTION SO THAT WE MAY ACT IMPROPERLY. THERE ARE OTHER LAWS WHICH CAN BE APPLIED WHEN OUR ACTIONS DESERVE SCRUTINY AND SUIT. THESE INCLUDE SECTION 1983, THE HOBBS ACT, SUNSHINE LAWS AND MANY STATE STATUTES. IN FACT, ALMOST ALL ANTITRUST SUITS AGAINST COUNTIES ARE ALSO BROUGHT UNDER SECTION 1983. SECTION 1983 HAS BEEN INTERPRETED SO BROADLY THAT ALMOST ALL OUR ACTIONS ARE SUBJECT TO SCRUTINY UNDER ITS APPLICATION. THE CONTINUAL INCREASE IN THE NUMBERS OF SECTION 1983 SUITS FILED IS A CASE IN POINT. IN 1960, ONLY 270 CASES WERE FILED. BY 1982, THIS NUMBER HAD RISEN TO 21,000 CASES. IN FACT, THESE SUITS HAVE BEEN BROUGHT ON ISSUES RANGING FROM DEVELOPMENT RIGHTS TO THE GRANTING OF FRANCHISES AND LICENSES.

EXTENDING COVERAGE OF FEDERAL ANTITRUST LAW TO LOCAL GOVERNMENTS MAKES LITTLE SENSE WHEN THESE GOVERNMENTS ARE ALREADY SUBJECT TO SUIT UNDER OTHER LAWS FOR ANY IMPROPER ACTIVITIES.

THE FEAR OF TREBLE DAMAGES PARALIZES LOCAL OFFICIALS AND IMPEDES THEIR GOVERNANCE. WE DO NOT BELIEVE THAT CONGRESS INTENDED THE SHERMAN AND CLAYTON ACTS TO HAVE THIS STIFLING EFFECT ON LOCAL GOVERNANCE. MOREOVER, THE LEGISLATIVE HISTORY OF THE SHERMAN ACT CLEARLY SHOWS THAT IT WAS ENACTED TO CURTAIL THE GROWTH OF "THESE COMMERCIAL MONSTERS CALLED TRUSTS. . .ROBBING THEIR VICTIMS, THE GENERAL PUBLIC, IN DEFINANCE OF EVERY PRINCIPLE OF LAW OR MORALS."** MR. CHAIRMAN, AND MEMBERS OF THIS COMMITTEE, I SUBMIT TO YOU THAT WE LOCAL ELECTED OFFICIALS ARE, IN THIS SENSE, THE PUBLIC -- WE ARE THEIR SERVANTS. ACTING ON THEIR BEHALF. ANTITRUST LIABILITY OF LOCAL GOVERNMENT OFFICIALS IS IN DIRECT CONFLICT TO THE INITIAL INTENT OF THE SHERMAN ACT. THE COURTS HAVE CLEARLY GONE BEYOND THE ORIGINAL INTENTIONS OF THE CONGRESS.

WHILE IT WAS NOT CONGRESS' INITIAL INTENT TO INCLUDE LOCAL GOVERNMENTS UNDER COVERAGE OF FEDERAL ANTITRUST LAW, DOES CONGRESS AGREE WITH THE LAFAYETTE AND BOULDER DECISIONS EXPANSION? IN LIGHT OF THE NEEDS OF OUR PRESENT DAY GOVERNING SYSTEM, I WOULD THINK NOT. AS BUDGETS TIGHTEN, THE NEED FOR MORE INNOVATIVE AND ALTERNATIVE SERVICE DELIVERY SYSTEMS BECOMES ALL THE MORE CRUCIAL. LOCAL GOVERNMENTS ARE DOING MORE WITH LESS. WE ARE PICKING UP WHERE THE FEDERAL AND STATE GOVERNMENTS LEAVE OFF. COUNTIES ARE, INDEED, THE GOVERNMENT OF LAST RESORT.

IN ORDER FOR COUNTIES TO FULLFILL THIS FUNCTION, WE OFTEN ENTER INTO BROAD INTERGOVERNMENTAL AGREEMENTS WITH EITHER THE PRIVATE SECTOR, OR WITH OTHER GOVERNMENTAL JURISDICTIONS. THESE ARE HARD CHOICES. THEY ARE NECESSARY GIVEN THE CHALLENGES OF LOCAL GOVERNMENT WITHIN OUR ECONOMIC CLIMATE.

COUNTIES MUST HAVE SOME AUTHORITY TO ENTER INTO INTERGOVERNMENTAL AGREEMENTS. FOR THE MOST PART, HOME RULE COUNTIES ENJOY THE POWERS TO CONTRACT SERVICES, OR COMBINE FUNCTIONAL PROGRAMS WITH EITHER THE PRIVATE SECTOR OR ANOTHER GOVERNMENTAL ENTITY.

OFFICIALS AT BOTH THE LOCAL AND STATE LEVEL RECOGNIZE THE IMPORTANCE OF HOME RULE AUTHORITY WITHIN THE NEEDS OF MODERN DAY GOVERNMENT. IN MICHIGAN, FOR EXAMPLE, IT WAS THE STATE GOVERNMENT THAT ACTIVELY PROMOTED THE MODERNIZATION OF WAYNE COUNTY TO AN ELECTED EXECUTIVE FORM OF COUNTY GOVERNMENT WITH HOME RULE AUTHORITY.

**REMARKS BY SENATOR JAMES K. JONES OF ARKANSAS DURING DEBATE OF PASSAGE, 21 CONG. REC. 2562 (1890).

IN SOUTH CAROLINA, GOVERNOR RILEY WAS A KEY SUPPORTER OF HOME RULE WHILE HE WAS IN THE STATE LEGISLATURE. SOUTH CAROLINA HOME RULE COUNTIES, BEGINNING WITH THE PIONEER, CHARLESTON COUNTY IN 1949, EMPHASIZED PROFESSIONAL MANAGEMENT. THE HOME RULE MOVEMENT HAS HERALDED THE EXPANSION OF THE USE OF PROFESSIONALLY TRAINED AND EXPERIENCED ADMINISTRATORS. THIS HAS PRECIPITATED A GREATER CAPACITY TO ENTER INTO CONTRACTS, INTERGOVERNMENTAL AGREEMENTS, AND TO DEVELOP CREATIVE ALTERNATIVE DELIVERY SYSTEMS. THESE PRODUCTS OF PROFESSIONAL COUNTY MANAGEMENT HAVE LED TO CONSIDERABLE SAVINGS OF LOCAL DOLLARS, AS WELL AS SAVINGS FOR THE FEDERAL AND STATE GOVERNMENTS.

YET THE BOULDER AND GRAYSLAKE DECISIONS UNDERMINE THE HOME RULE MOVEMENT, AND DETER OFFICIALS FROM IMPLEMENTING INNOVATIVE OR REGIONAL APPROACHES TO PUBLIC SERVICE PROBLEMS -- EVEN THOUGH SUCH INNOVATIONS ARE IN THE BEST INTERESTS OF THE CITIZENS AND SAVE SUBSTANTIAL PUBLIC FUNDS. THE GRAYSLAKE DECISION, BECAUSE OF THE "SPHERE OF INFLUENCE" ARRANGEMENT, WILL MAKE ANY LOCAL ELECTED OFFICIAL THINK TWICE BEFORE ENTERING INTO AN INTERGOVERNMENTAL AGREEMENT WITH OTHER JURISDICTIONS SINCE HIS COUNTY COULD BE HELD LIABLE. THE FACT THAT ANTITRUST LIABILITY IS ALSO PERSONAL LIABILITY MAKES SUCH AGREEMENTS ALL THE MORE THREATENING. INDEED, JUSTICE REHNQUIST' DISSENTING OPINION IN BOULDER SEEMS ALL THE MORE COMPELLING WHEN HE SAID "THE DECISION TODAY EFFECTIVELY DESTROYS THE 'HOME RULE' MOVEMENT IN THIS COUNTRY THROUGH WHICH LOCAL GOVERNMENTS HAVE OBTAINED, NOT WITHOUT PERSISTENT STATE OPPOSITION, A LIMITED AUTONOMY OVER MATTERS OF LOCAL CONCERN."

WHY A CONGRESSIONAL SOLUTION IS NECESSARY

IN OUR JUDGMENT, IT IS CLEAR THAT LOCAL GOVERNMENTS, AND THEIR OFFICIALS, NEED PROTECTION UNDER FEDERAL ANTITRUST LAWS. IT IS ALSO CLEAR THAT WE SEE A FEDERAL RATHER THAN SOLELY A STATE SOLUTION. OUR POLICY CALLS FOR FEDERAL LEGISLATION WHICH WOULD AFFORD COUNTY GOVERNMENTS, AND THEIR OFFICIALS, THE SAME PROTECTION AS THAT ENJOYED BY STATE GOVERNMENT AND, ITS OFFICIALS, SO LONG AS WE ARE ACTING AS A GOVERNMENTAL ENTITY AND ARE WITHIN STATE LAW. AS CREATURES OF AND ADMINISTRATIVE ARMS FOR STATE GOVERNMENT, COUNTY GOVERNMENT, AND ITS OFFICIALS, SHOULD NOT BE SUBJECT TO ANTITRUST LIABILITY FOR THOSE ACTIONS WHERE THE COUNTY IS PROVIDING A PUBLIC SERVICE AND IS PROTECTING THE HEALTH AND SAFETY OF ITS CITIZENS AS AN INTRICATE MEMBER OF OUR FEDERAL SYSTEM. WHERE STATES HAVE EMPOWERED A COUNTY TO ACT, EITHER

BY SPECIFIC OR DELEGATE AUTHORITY, THE STATE ENJOYED IMMUNITY SHOULD APPLY. THEREFORE, WE ASK THAT CONGRESS ENACT A BILL WHICH WOULD PROVIDE THIS IMMUNITY, AND WHICH WOULD:

- PROVIDE PROTECTION FOR GENERAL AND SPECIAL PURPOSE GOVERNMENTS;
- PROVIDE PROTECTION FOR THE PERSONAL LIABILITY OF THE ENTITIES' OFFICIALS;
- PROVIDE THIS PROTECTION ON A BROAD CATEGORY BASIS RATHER THAN BY SPECIFIC FUNCTIONAL AREA;
- PROHIBIT THE RECOVERY OF TREBLE DAMAGES;
- LIMIT THE RECOVERY OF ANY DAMAGES TO ONLY INJUNCTIVE RELIEF;
- NOT CODIFY A DISTINCTION BETWEEN ACTIONS TAKEN IN A GOVERNMENTAL CAPACITY VERSUS THOSE TAKEN IN A PROPRIETARY AREA.

THIS FINAL PROVISION OF NACo'S PROPOSAL IS IMPORTANT. WE RECOGNIZE THAT THE COURTS, AS IN JEFFERSON COUNTY, WILL DEVELOP CASE LAW IN THIS AREA. THERE IS NO NEED FOR CONGRESS TO PROVIDE A STATUTORY BASE FOR WHAT CONSTITUTES PROPRIETARY VERSUS THAT WHICH IS STRICTLY GOVERNMENTAL IN NATURE. WE BELIEVE SUCH DISTINCTIONS ARE FAR TOO DIFFICULT AND WOULD EVENTUALLY CREATE MORE PROBLEMS THAN PROVIDE A SOLUTION. CLEARLY, THE LOCAL ECONOMICS MAY MEAN THAT MANY ACTIVITIES IN THE LOCAL GOVERNMENT ARENA WILL MOVE FROM PUBLIC TO PRIVATE TO PERHAPS PUBLIC AGAIN. THE CASE OF HOSPITAL CARE IS A GOOD EXAMPLE. BECAUSE OF FISCAL PROBLEMS, THE COUNTY MAY SELL ITS HOSPITAL. THE HOSPITAL MAY THEN REFUSE TO CARE FOR THE INDIGENT. THROUGH MUTUAL AGREEMENT, THE COUNTY BUYS THE HOSPITAL BACK. THE HOSPITAL MAY BE THE ONLY HEALTH CARE FACILITY WITHIN THE ENTIRE COUNTY AREA. IS THE HOSPITAL THEN A GOVERNMENTAL OR A PROPRIETARY ACTIVITY? I WOULD ARGUE THAT IT IS, INDEED, A GOVERNMENTAL RESPONSIBILITY.

IN RICHLAND COUNTY, THE COUNTY OPERATED AMBULANCE SYSTEM IS AN EXCELLENT EXAMPLE. ORIGINALLY, FUNERAL HOMES PROVIDE ALL OUR AMBULANCE SERVICE. HOWEVER, SLOWLY THE FUNERAL HOMES TERMINATED AMBULANCE CARE. FACING THE DILEMMA OF NO AMBULANCE SERVICE, THE COUNTY ESTABLISHED A PROCESS AND RELEASED AMBULANCE FRANCHISES TO PRIVATE PARTIES. HOWEVER, EACH FRANCHISE FAILED AND THE COUNTY WAS ONCE AGAIN FORCED TO FACE THE PROBLEM OF NO AMBULANCE CARE. RECOGNIZING THE NECESSITY OF THIS TYPE OF SERVICE, AND THE FACT THAT THE PRIVATE SECTOR WAS UNABLE TO SUCCESSFULLY OPERATE A PROFIT MAKING AMBULANCE SERVICE, THE COUNTY INITIATED

ITS OWN SYSTEM. WE NOW OWN AND OPERATE OUR OWN AMBULANCES.

USING THE AMBULANCE EXAMPLE, LET US SUPPOSE THAT CONGRESS ENACTED LEGISLATION WHICH PROVIDED PROTECTION FROM ANTITRUST LIABILITY ONLY IN THOSE CASES WHERE THE GOVERNMENT IS PROVIDING A TRADITIONAL GOVERNMENTAL SERVICE. LET'S SAY AMBULANCE CARE IS NOT CONSIDERED A GOVERNMENTAL SERVICE. UNDER THIS PRESUMPTION, OUR COUNTY WOULD REMAIN LIABLE EVEN IN THE PROVISION OF AN ESSENTIAL AND NECESSARY SERVICE FOR WHICH THE PRIVATE SECTOR HAS CLEARLY FAILED. YET, SUIT COULD BE FILED. HOW WOULD SUCH A SYSTEM REWARD GOVERNMENTS FOR ACTING RESPONSIBLY. OBVIOUSLY, SUCH DISTINCTIONS CAN LEAD TO POOR PUBLIC POLICY, AND WOULD PENALIZE LOCAL OFFICIALS IN RESPONDING TO CITIZEN'S NEEDS.

WHY DO WE SEEK A FEDERAL SOLUTION WHEN SOME MAY ARGUE THAT IT IS A MATTER FOR THE STATES TO DECIDE. FIRST, THE SHERMAN AND CLAYTON ACTS ARE FEDERAL LAWS. CONGRESS ENACTED THEM. FEDERAL COURTS HAVE EXCLUSIVE JURISDICTION OVER THEM. IT SEEMS ONLY NATURAL THAT CONGRESS SHOULD CLARIFY ITS INTENT OF FEDERAL STATUTES APPLICATION TO LOCAL GOVERNMENT.

SECOND, THERE ARE SOME VERY SERIOUS DRAWBACKS IN SEEKING A STATE SOLUTION. COUNTIES WOULD BE FORCED TO GO TO THEIR STATE LEGISLATURES TO OBTAIN IMMUNITY. SUCH ACTION WOULD REQUIRE LOCAL ELECTED OFFICIALS TO USE UP POLITICAL CHITS ON IMMUNITY LEGISLATION, RATHER THAN ON MATTERS MORE APPROPRIATE FOR SUCH INTERGOVERNMENTAL NEGOTIATION. GENERALLY, STATES WOULD CONSIDER IMMUNITY ON A NARROW, FUNCTIONAL BASIS. CONSEQUENTLY, THE LOCAL OFFICIALS WILL BE BEFORE THEIR LEGISLATURE REPEATEDLY ON IMMUNITY MATTERS RANGING FROM CABLE TELEVISION FRANCHISING TO ZONING AND LAND USE CONTROLS. GIVEN THE VAST AREAS WHERE THERE IS THE POTENTIALITY OF SUIT, VERY LITTLE POLITICAL CAPITAL WOULD REMAIN FOR MATTERS OF INTENSE IMPORTANCE TO OUR CITIZENS, SUCH AS THE NEED FOR REPAIRS ON A STATE HIGHWAY, OR IMPROVEMENTS TO A STATE MENTAL HEALTH FACILITY WITHIN THE COUNTY.

MOREOVER, THERE IS NO GUARANTEE THAT THE STATES WILL ACT. CONGRESS CANNOT FORCE THE LEGISLATURES TO ACT, OR CONTROL THE EXTENT OF THEIR IMMUNITY ACTION. IT HAS BEEN TWO YEARS SINCE THE BOULDER DECISION WAS RENDERED. YET FEWER THAN TEN STATES HAVE ACTED. WITH THE EXCEPTION OF TWO STATES, BY AND LARGE, THOSE THAT

HAVE PROVIDED IMMUNITY HAVE DONE SO IN NARROW CATEGORIES. IN SOME STATES, THE LEGISLATORS HAVE BEEN UNABLE TO REACH A CONCLUSION ON THE IMMUNITY ISSUE. THE VIRGINIA LEGISLATURE CONSIDERED THIS PAST SESSION. IN A JOINT RESOLUTION, IT CALLED ON CONGRESS TO PROVIDE IMMUNITY RECOGNIZING THE CRITICAL NATURE OF THE MATTER.

WE APPRECIATE AND RECOGNIZE THE VIRGINIA LEGISLATURE FOR ITS CONSIDERATION OF THIS ISSUE. BUT WHERE ARE WE IF CONGRESS FAILS TO PROVIDE IMMUNITY AND THE STATES PASS THE BUCK BACK TO THE NATIONAL LEVEL? WHAT GOVERNMENT IS LEFT ACCOUNTABLE?

THERE IS ALSO THE PROBLEM OF UNIFORMITY. SHOULD EACH INDIVIDUAL STATE PROVIDE SOME IMMUNITY TO LOCAL OFFICIALS AND THEIR ENTITIES, WE WOULD HAVE 50 DIFFERENT INTERPRETATIONS OF FEDERAL ANTITRUST LAW. EACH LEGISLATURE COULD PROVIDE IMMUNITY IN VARYING DEGREES AND LEAVE LOCAL OFFICIALS SUBJECT TO SUIT IN VARYING GOVERNMENTAL OR PROPRIETARY AREAS. CONSEQUENTLY, IT IS CONCEIVABLE THAT A COUNTY OFFICIAL IN FAIRFAX, VIRGINIA COULD BE SUBJECT TO LIABILITY AND FACE PERSONAL LIABILITY FOR TREBLE DAMAGES FOR WHICH A MONTGOMERY COUNTY, MARYLAND OFFICIAL WOULD ENJOY TOTAL IMMUNITY. WE ASK YOU, IS THIS A FAIR APPLICATION OF FEDERAL ANTITRUST LAW?

RETROACTIVITY IS ANOTHER AREA OF CONCERN. IT WILL TAKE SOME TIME FOR THE STATES TO PROVIDE IMMUNITY. WHILE STATE LEGISLATURES DEBATE THE ISSUE, COUNTY OFFICIALS WILL CONTINUE TO BE SUBJECT TO SUIT. IN A RECENT CASE, WE HAVE WITNESSED THE FAILURE OF A FEDERAL COURT TO DISMISS THE CASE AFTER THE STATE LEGISLATURE HAD ACTED BECAUSE THE ALLEGED VIOLATION TOOK PLACE PRIOR TO THE ENACTMENT OF THE STATE IMMUNITY. IT COULD TAKE YEARS BEFORE THE STATES PROVIDE A STATE SOLUTION, OR PROVIDE PROTECTION IN THE VAST ARRAY OF SERVICE AREAS THAT WOULD BE REQUIRED. IN THE MEANTIME, WE LOCAL PUBLIC SERVANTS REMAIN UNDER THE THREAT OF SUIT.

IN ORDER FOR THE STATES TO PROVIDE IMMUNITY, SOME STATES MAY BE REQUIRED TO AMEND THEIR OWN CONSTITUTIONS. THIS WOULD BE PARTICULARLY TRUE FOR CHARTER CITIES IN SEVERAL STATES. AS YOU ARE WELL AWARE, AMENDING A CONSTITUTION IS NO EASY PROCESS. IN MANY CASES, THE CITIZENS MAY NOT UNDERSTAND THE ISSUE AND MAY FAIL TO RATIFY THE AMENDMENTS. CONSEQUENTLY, CITY AND COUNTY GOVERNMENTS WOULD REMAIN LIABLE REGARDLESS OF THE GOOD INTENTIONS OF CONGRESS, THE GOVERNOR, OR THE STATE LEGISLATURE.

FINALLY, THERE IS SOME QUESTION AS TO WHETHER STATE IMMUNITY LEGISLATION WOULD BE ACCEPTABLE. WOULD A FEDERAL COURT, CONSIDERING A FEDERAL LAW, RECOGNIZE THE IMMUNITY OF A LOCAL GOVERNMENT OR ITS OFFICIALS SIMPLY BECAUSE THE STATE LEGISLATURE HAS EXTENDED ITS EXEMPTION UNDER PARKER. THERE IS SOME QUESTION AS TO WHETHER THIS WOULD BE THE CASE. THE COURTS MAY WELL FIND THAT MANY ACTIVITIES CAN ONLY BE PROTECTED BY FEDERAL IMMUNIZING LEGISLATION.

COMMENTS ON LEGISLATIVE PROPOSAL

MR. CHAIRMAN, NACo IS PLEASED YOUR BILL, S. 1578, PROPOSES A FEDERAL LEGISLATIVE SOLUTION TO THE ANTITRUST CRISIS FACING LOCAL GOVERNMENTS. WE FULLY SUPPORT SUCH A GENERAL STRATEGY FOR WE RECOGNIZE THAT CONGRESS IS THE MOST APPROPRIATE BODY TO INTERPRET THE APPLICATION OF ITS OWN LAWS.

COUNTIES SUPPORT THE GENERAL CONCEPT OF "THE LOCAL GOVERNMENT ANTITRUST ACT OF 1983." WE ALSO RECOGNIZE THAT YOUR PROPOSAL, MR. CHAIRMAN, IS INTENDED TO PROVIDE A BALANCED POLICY WHICH PROTECTS THE NEED OF LOCAL GOVERNMENTS WITH THE NEED TO PROTECT THE INTEGRITY OF FEDERAL ANTITRUST LAW. AS YOU APTLY STATED WHEN YOU INTRODUCED S. 1578, LOCAL GOVERNMENTS NEED TO "GO ABOUT THEIR DAILY FUNCTIONS WITHOUT THE PARALYZING FEAR OF ANTITRUST LAWSUITS." COUNTIES APPRECIATE YOUR RECOGNITION OF THIS PROBLEM AND COMMEND YOUR LEADERSHIP IN THIS AREA. HOWEVER, S. 1578 DOES NOT PROVIDE LOCAL OFFICIALS WITH ADEQUATE PROTECTION. WE URGE THAT YOU CONSIDER AMENDING YOUR PROPOSAL MR. CHAIRMAN, TO PROVIDE PROTECTION FOR:

1) LOCAL GOVERNMENT OFFICIALS WHICH PRESENTLY ARE NOT COVERED UNDER THE PROPOSAL; AND
2) ALL GOVERNMENTAL ENTITIES, REGARDLESS IF THESE ENTITIES ARE GENERAL OR SPECIAL PURPOSE.

THE REASONS FOR THESE AMENDMENTS ARE QUITE SIMPLE. TO PROTECT THE GOVERNMENTAL ENTITY AND NOT THE ELECTED OFFICIALS, THEMSELVES, DOES NOT ADEQUATELY SOLVE THE ANTITRUST DILEMMA. WHILE THE ENTITY WOULD BE PROTECTED, DECISIONS LOCAL ELECTED OFFICIALS MADE WOULD REMAIN SUBJECT TO SUIT. CONSEQUENTLY, LOCAL OFFICIALS WOULD NOT "BE ABLE TO GO ABOUT THEIR DAILY BUSINESS WITHOUT THE PARALYZING FEAR OF ANTITRUST SUIT." THIS OVERSIGHT NEEDS TO BE CORRECTED.

WITH REGARD TO PROVIDING PROTECTION FOR SPECIAL PURPOSE GOVERNMENTAL ENTITIES, IT SEEMS ONLY LOGICAL TO EXTEND THE PROTECTION FROM SUIT TO GOVERNMENTAL ENTITIES WHICH HAVE BEEN SPECIFICALLY CREATED

BY STATE LEGISLATIVE ACTION, OR BY JOINT GUBERNATORIAL AND GENERAL PURPOSE LOCAL GOVERNMENT ACTION FOR A SPECIFIC GOVERNMENTAL PURPOSE. THESE SPECIAL PURPOSE GOVERNMENTAL ENTITIES INCLUDE SEWER AND WATER DISTRICTS, FIRE DISTRICTS AND SCHOOL DISTRICTS. GENERALLY, SUCH DISTRICTS CANNOT BE CREATED WITHOUT THE APPROVAL OF STATE AND/OR LOCAL GOVERNMENT BY SPECIFIC LEGISLATIVE ACTION.

IN ADDITION, COUNTIES URGE THAT YOU AMEND S. 1578 SO THAT CONGRESS DOES NOT CODIFY A DISTINCTION BETWEEN WHAT IS TERMED TRADITIONALLY GOVERNMENTAL AND THAT WHICH IS PROPRIETARY. SPECIFICALLY, WE ASK THAT YOU STRIKE THE LANGUAGE "BUT EXCLUDING ANY ACTIVITY INVOLVING THE SALE OF GOODS OR SERVICES BY THE UNIT OF LOCAL GOVERNMENT IN COMPETITION WITH PRIVATE PERSONS, WHERE SUCH LAW OR ACTION IS VALID UNDER STATE LAW, EXCEPT TO THE EXTENT THAT THE FEDERAL ANTITRUST LAWS WOULD APPLY TO SIMILAR LAW OR ACTION OF, OR OFFICIAL ACTION DIRECTED BY A STATE." WE RECOGNIZE THAT THIS LANGUAGE IS AN ATTEMPT TO ENSURE COMPETITION AND, AT THE SAME TIME, TO PROVIDE PROTECTION FOR THOSE AREAS WHICH STATE GOVERNMENT MAY ALREADY BE IMMUNED. BUT THE LANGUAGE DOES NOT PROVIDE ADEQUATE PROTECTION IN THOSE AREAS WHERE LOCAL GOVERNMENTS PROVIDE PUBLIC SERVICES WHICH COULD BE IN COMPETITION WITH PRIVATE PERSONS AND FOR WHICH THE STATE HAS NO IMMUNITY. SINCE THE STATE MAY NOT TRADITIONALLY PROVIDE A PARTICULAR SERVICE, THERE WOULD BE NO STATE IMMUNITY TO EXTEND TO THAT PARTICULAR LOCAL ACTION.

WE DO NOT BELIEVE THAT A CLEAR DELINEATION CAN BE DRAWN FOR THAT WHICH IS PURELY GOVERNMENTAL OR THAT WHICH IS PROPRIETARY. RICHLAND COUNTY'S AMBULANCE SERVICE IS A GOOD CASE IN POINT. AS STATED EARLIER, PRIVATE AMBULANCE SERVICE HAD REPEATEDLY FAILED. THERE ARE, AND THERE WILL CONTINUE TO BE, AREAS WHERE LOCAL GOVERNMENTS PROVIDE SERVICES WHICH COULD COMPETE WITH PRIVATE PARTIES, BUT FOR WHICH PRIVATE ENTERPRISE HAS FAILED TO PROVIDE ADEQUATE SERVICE. AFTER ALL THE INVESTMENT IN PURCHASING AMBULANCES AND OPERATING A SYSTEM, WOULD IT BE FAIR TO SIMPLY ALLOW A NEW COMPANY TO ATTEMPT TO PROVIDE THE SERVICE AND TAKE THE RISK THAT THEY, LIKE OTHERS IN THE PAST, WOULD FAIL? HOW DO WE JUSTIFY THE WASTE OF DOLLARS IN THE CAPITAL INVESTMENT WE HAVE MADE TO THE COUNTY OPERATED SYSTEM? CLEARLY, FEDERAL ANTITRUST STATUTES SHOULD NOT IMPEDE LOCAL OFFICIALS TO PROVIDE ESSENTIAL SERVICES AND TO MAKE DECISIONS WHICH ARE IN THE BEST INTEREST OF THE CITIZENS, AND THEIR TAX DOLLARS.

OUR FINAL COMMENT ON S. 1578 FOCUSES ON THE QUESTION OF DAMAGES. "THE LOCAL GOVERNMENT ANTITRUST ACT OF 1983" DOES NOT PRESENTLY PRO-

VIDE FOR A LIMITATION ON DAMAGES IN THOSE AREAS WHICH WOULD REMAIN SUBJECT TO SUIT. CONSEQUENTLY, I AND MY COUNTY, COULD BE SUED FOR OUR AMBULANCE SYSTEM. WE COULD LOSE AND FACE DAMAGES OF ENORMOUS SUMS. LIKE THE VILLAGE OF GRAYSLAKE, RICHLAND COUNTY WOULD BE HARD-PRESSED TO RAISE MILLIONS OF DOLLARS TO PAY THESE DAMAGES. IT WOULD BE DIFFICULT, AT BEST, TO SIMPLY PAY FOR THE COSTS OF OUR DEFENSE. OUR ENTIRE BUDGET DOES NOT EQUAL THE DAMAGE AWARD UNDER GRAYSLAKE. OUR PROPERTY TAXES COULD NOT COVER THE ACTUAL DAMAGE ASSESSMENT OF $9.5 MILLION. THE FUNDS WE RECEIVED FROM THE STATE ONLY AMOUNT TO $6.2 MILLION. THESE FUNDS ARE ALREADY OBLIGATED. EVEN SO, THEY WOULD NOT ADEQUATELY PROVIDE RESTITUTION UNDER SUCH A SUIT. THEREFORE, MR. CHAIRMAN, WE ASK THAT YOU CONSIDER AMENDING THIS LEGISLATION TO LIMIT DAMAGES TO INJUNCTIVE RELIEF AT MOST. THIS WOULD PROVIDE PROTECTION FOR THE INTEGRITY OF THE ANTITRUST LAWS, AND AT THE SAME TIME, WOULD ALLEVIATE THE BANKRUPTCY POTENTIAL FOR LOCAL GOVERNMENTS, AND THEIR OFFICIALS.

WHILE THE BILL PENDING BEFORE THIS COMMITTEE IS NOT PERFECT, WE APPRECIATE AND COMMEND YOUR EFFORTS, MR. CHAIRMAN. WE THANK YOU FOR YOUR LEADERSHIP, AND LOOK FORWARD TO WORKING WITH YOU TO FINE-TUNE YOUR PROPOSAL.

SUMMARY

GRANTING LOCAL GOVERNMENTS IMMUNITY UNDER THE FEDERAL ANTITRUST STATUTES RECOGNIZES THAT IMPROPER LOCAL GOVERNMENTAL ACTIONS CAN BE CHALLENGED UNDER A WIDE VARIETY OF EXISTING LAWS - FEDERAL, STATE AND LOCAL. LOCAL GOVERNMENTS CAN BE SUED, FOR EXAMPLE, UNDER SECTION 1983, SUNSHINE LAWS, FREEDOM OF INFORMATION LAWS, AND CONFLICT OF INTEREST STATUTES. AS REPRESENTATIVE HAMILTON FISH, JR. TOLD A RECENT NACo AUDIENCE, "THERE ARE IN PLACE IN ALL THE STATES CRIMINAL AND CIVIL STATUTES DEALING WITH FRAUD, WRONG-DOING AND CONFLICT OF INTEREST BY LOCAL OFFICIALS. IT IS THROUGH THESE LAWS - NOT THE FEDERAL ANTITRUST LAWS - THAT UNETHICAL ACTIONS SHOULD BE CHECKED OR PUNISHED."

IN INTRODUCING S. 1578, MR. CHAIRMAN, YOU ASKED YOUR DISTINGUISHED COLLEAGUES "ARE THERE SUFFICIENT AND COMPELLING REASONS TO TREAT THE LEGITIMATE ACTIVITIES OF LOCAL GOVERNMENT DIFFERENTLY FROM THOSE OF STATE GOVERNMENT UNDER THE ANTITRUST LAWS?" YOU ANSWERED, "WITHIN REASONABLE LIMITATIONS, I BELIEVE THE ANSWER TO THIS QUESTION IS NO." YOUR RESPONSE RECOGNIZES THE UNIQUE RELATIONSHIP BETWEEN STATE AND LOCAL GOVERNMENT. WE OFFICIALS RECOGNIZE THAT COUNTIES ARE NOT STATE GOVERNMENT, BUT WE ALSO REALIZE THAT OUR ACTIONS AND ACTIVITIES ARE ON

BEHALF OF STATE GOVERNMENT. WE DO NOT SEEK ANY DIFFERENT TREATMENT THAN THAT WHICH WOULD BE GIVEN TO STATE GOVERNMENT IF THE STATE, ITSELF, HAD TAKEN THAT ACTION SO LONG AS WE ARE EMPOWERED BY THE STATE EITHER THROUGH HOME RULE AUTHORITY, OR ENABLING LEGISLATION. THE COURTS HAVE INTERPRETED FEDERAL ANTITRUST LAWS IN A MANNER WHICH SKEWS THE TRADITIONAL INTERGOVERNMENTAL RELATIONSHIP BETWEEN STATE AND LOCAL GOVERNMENT. CLEARLY, CONGRESS MUST PUT IT RIGHT.

ANTITRUST LITIGATION IS NOT ONLY VERY COSTLY BUT CASTS A CHILLING AFFECT ON LEGITIMATE GOVERNMENTAL ACTIVITY. AS THE ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS OBSERVED LAST SEPTEMBER IN A MEMO TO ITS MEMBERS: "LOCAL OFFICIALS HAVE BEGUN TO REPORT THAT WHEN A SUIT IS THREATENED AGAINST A PARTICULAR ACTIVITY, OUT OF FEAR OF THE COSTS TO THEIR LOCALITIES AND TO THEMSELVES, INTENDED POLICIES ARE DELAYED OR REVERSED."

THE SAD REALITY IS THAT COUNTY OFFICIALS HAVE BECOME INTIMIDATED BY ANTITRUST LAWYERS WHEN THEY ATTEMPT TO REGULATE THE PRIVATE SECTOR -- WHETHER IT INVOLVES REZONING A PARCEL OF LAND OR REGULATING AMBULANCE CARE TO PROMOTE THE HEALTH AND WELFARE OF ITS CITIZENS. WHEN COUNTIES CREATIVELY ATTEMPT TO OFFER SPECIAL SERVICES FOR THEIR CITIZENS -- THEY RISK BEING HAULED INTO FEDERAL COURT TO FACE COSTLY AND PROTRACTED LITIGATION.

BEYOND THE PARALYSIS THAT HAS ACCOMPANIED THE EXPANSION OF ANTITRUST LIABILITY TO LOCAL GOVERNMENTS AND THEIR OFFICIALS IS THE NEGATIVE IMPACT OF ANTITRUST LITIGATION ON THE HOME RULE MOVEMENT IN OUR COUNTRY. IT IS IRONIC THAT THIS TREND AGAINST LOCAL CONTROL SHOULD OCCUR AT A TIME WHEN LOCAL GOVERNMENTS FIND THEMSELVES STRUGGLING TO FULFILL THEIR NEW RESPONSIBILITIES IN A TIME OF DIMINISHING FEDERAL AND STATE RESOURCES.

MR. CHAIRMAN, WE ARE VERY GRATEFUL TO YOU AND THIS COMMITTEE FOR CONDUCTING HEARINGS ON A MATTER OF SUCH URGENCY TO LOCAL GOVERNMENTS. WE COMMEND YOUR LEADERSHIP, AND STAND COMMITTED TO WORK WITH YOU TO ENACT LEGISLATION WHICH RESTORES THE BALANCE AND ENHANCES APPROPRIATE PUBLIC POLICY IN CITIES AND COUNTIES THROUGHOUT THE COUNTRY.

I WOULD BE PLEASED TO RESPOND TO ANY QUESTIONS.

THANK YOU;

The CHAIRMAN. Our next witness is the Hon. William J. Althaus, Mayor of York, Pa, on behalf of the U.S. Conference of Mayors.

Mayor ALTHAUS. Thank you very much, Mr. Chairman. I feel a need to apologize for not being from South Carolina.

The CHAIRMAN. Many Pennsylvanians are now coming to South Carolina.

Mayor ALTHAUS. I am sure they are and for good reasons, Senator.

First of all, I appear on behalf of the U.S. Conference of Mayors. I have a prepared statement which I would ask be made a part of the record, and I will certainly not burden the chairman with reading from that.

I would like to make a couple of very brief observations from the standpoint of a local official in a small municipality.

In over 2 years since the *Boulder* case, there has been a lot of talk about this issue, and this committee has taken the lead in holding hearings, and we very much appreciate, as others have indicated, your leadership in introducing legislation. Nothing has passed at this point, and it is the judgment of the U.S. Conference of Mayors that the time has come for such passage.

You have heard a number of witnesses talk about the chilling effect on local government. I do not think that so much reflects the lack of courage on the part of local officials because, frankly, most people in public life did not get there by being bashful. But we do have a responsibility, Mr. Chairman.

Even if I feel our liability and insurance covers me, we do not even know if it does, but if all that is so, I do not want to lead my constituents down the path where they are facing some stunning judgment which they absolutely cannot address.

The biggest problem post-Boulder is the uncertainty of the situation. There is a mishmash of court interpretations—the *Unity Venture* case in Illinois is just stunning. As I understand it, that one is in postverdict motions in the local court. We do not know where it is going.

We are embarking on a TV franchise renewal; a $30 million upgrade of our sewer plants mandated by EPA, and we do not know what direction to take on some of these things.

I guess my main point to the committee is this is a Federal problem. It arises from interpretations of the law by the Federal courts.

The suggestion after *Boulder* that perhaps case law would settle it or the States or local governments would work it out has gone as far as it can. State law has not solved it and State governments have agreed on those aspects on which they can agree.

Like the other witness, I submit that injunctive relief is sufficient. There is no justification for personal liability of officials for treble damages. We at the Conference of Mayors—and we are pleased that the Conference of Mayors and the administration are in agreement on this—believe that there are sufficient safeguards in place in Federal and State law to deter wrongdoing

My prepared statement refers to State bribery and conflict of interest laws as well as interstate bribery laws and interstate civil rights laws. There is adequate protection in the area for any wrongdoing, and injunctive relief would be sufficient.

I would submit one other point. Local government is a creature of the State. Anything local government does is by law serving a public purpose. If it is not, it is ultra vires. We are by definition doing only what serves the public purposes. It is our belief, as the other witnesses have indicated, that the governmental proprietary distinction should be institutionalized as a part of any legal remedy. I believe the governmental proprietary distinction is a useful tool, but it is not, in fact, something that is a clear-cut guideline to be written into positive law.

As Mayor Riley indicated, there are far too many cases where you will have endless litigation, and I might add parenthetically I am a retired lawyer myself, and it does not hurt me deeply to see lawyers prosper. However, I am also a public official, and I do not want to spend half my budget paying lawyers.

The *Richmond* case has something approaching $1 million in legal fees. I do not know what the total fees might have been, but those were the figures that were disclosed.

We have reached the point where we need relief, and it is our judgment that the relief should be at the Federal level, because State and local government efforts to resolve it have been done, and it is causing many of us concerns. I cannot ask my constituents to face those judgments when, on the facts, in some of these major disputes, it would be very hard for me to sit back and say had I known something about it, I would have done differently.

Some of those facts are ultra vires cases, clearly outside the authority of a local official, but there are plenty of remedies for them, and injunctive relief would be a sufficient remedy.

Those would be the suggestions of the U.S. Conference of Mayors.

We very much appreciate your efforts with S. 1578, and we would ask that action be taken in the immediate future.

The CHAIRMAN. I appreciate your comments here and thank you for your fine contribution

A very prominent member of this committee is from your State, Senator Arlen Specter. I am going to turn you over to him now for a few questions, and I will be back in just a few moments.

Senator SPECTER. Thank you, Mr. Chairman.

Mayor Althaus, I want to congratulate you for being here. I am sorry I could not be here earlier. Our schedule has us going in quite a few directions. I think it is a privilege to have you speaking here on behalf of the U.S. Conference of Mayors, and I commend you on your testimony.

I have just one question for you, does this potential antitrust liability pose a significant threat for a city like York which might be duplicated in other cities of that size in our own State and, really, across the country?

Mayor ALTHAUS. Thank you very much for being here, Senator. I felt outnumbered by the number of South Carolinians here for awhile.

Senator Specter, you have been a very good friend of local government in Pennsylvania, and my answer to your question is absolutely. As I indicated earlier, we are in the process of TV franchising, a major upgrade of our sewer plant under the 201 plan, and ambulance service. We are spending an inordinate amount of our city solicitor's staff time to avoid problems we do not understand, but the potential is there.

I would repeat, I am not concerned about my personal liability. That is not an audacious macho statement. You cannot worry about everything, but I do have a responsibility not to walk into something where the residents get a $30, $40, $50 million judgment. The effect could be stunning to a community like York, and there are a lot of communities like that. And something like this could have a stunning effect.

Senator **Specter**. Thank you very much.

Senator Thurmond will be back momentarily.

Mayor **Althaus**. Thank you very much.

Senator **Specter**. The committee will recess for about 5 minutes until Senator Thurmond returns.

[Short recess.]

[Prepared statement follows:]

STATEMENT OF THE HONORABLE WILLIAM J. ALTHAUS, MAYOR,
YORK, PENNSYLVANIA

ON BEHALF OF THE UNITED STATES CONFERENCE OF MAYORS,
BEFORE THE JUDICIARY COMMITTEE, U.S. SENATE
ON S.1578, MUNICIPAL ANTITRUST LIABILITY
APRIL 24, 1984

Chairman Thurmond, and distinguished members of this Committee. I am William J. Althaus, Mayor of York,Pennsylvania and I am here to speak with you on a matter of tremendous concern to cities throughout the United States. Mayors and their cities have now lived with the Boulder case for over two years and the time has come to move legislation such as S.1578 to protect cities.

While my own city of York has yet to face an antitrust challenge, we have worked with our city attorney to take precautionary steps to avoid such litigation. I am well aware of the concerns expressed by my fellow Mayors who, themselves, and in their cities, are being subjected to the rigors of antitrust litigation. Thank you for holding this hearing today and for inviting the participation of the Conference of Mayors.

The Conference of Mayors was one of the groups that had the privilege of appearing before this Committee when it held its hearings in the Summer of 1982 on the anticipated problems that the Boulder case, decided in January of that year, would create for cities. Then Mayor, Janet Gray Hayes of San Jose appeared before you. You and your Committee, and Committee staff, are to be commended for your prompt inquiries into the Boulder dilemma and for your continuing interest and involvement in this issue as it implicates cities and counties in their efforts to implement public policy.

In that testimony, Mayor Hayes raised at least two major concerns. The first was that the fallout from Boulder was crippling local government decision making, the second was that the state legislatures, even if they wanted to act, would have a difficult time in fashioning adequate state responses to Boulder questions. Suffice it to say that both predictions have come true. There are somewhere between 200 and 300 antitrust cases pending against local governments - many of them will soon be going to juries - and we have significant evidence of local governments simply delaying action, or settling with potential or real plaintiffs to avoid antitrust problems. The Richmond, Virginia example is illustrative: the city engaged in two years of litigation over a zoning question then settled the suit with a payment by the city of $2 million to the plaintiffs, in addition to granting the zoning requested by the plaintiffs. The city expended over $900,000 in its own defense in the case, and the case was settled prior to the filing of a motion to dismiss.

Second, the states have not been forthcoming in attempting to protect their local governments from antitrust scrutiny, even in areas of traditional governmental activity. In those states that have acted, the legislation may have created greater problems for local governments than those they were already facing. A recent U.S. District Court decision in Illinois found that the local government was not protected by the state's new protective statute because all of the acts complained of had taken place before the effective date of the statute. More importantly, Judge Grady went on to say that:

> However, the passage of this statute reinforces our analysis in that it highlights the difference between the legislature's merely authorizing a unit of local government to exercise certain power and the legislature's authorizing that power to be used anticompetitively. To the extent that the legislature saw the need to pass [the Illinois immunity statute], it could be argued that the legislature had not previously clearly articulated and affirmatively expressed an intention that units of government could act intentionally. Vickery Manor Service Corp. v. Village of Mundeline, U.S.D.C., N.D. Ill. E.D., No. 82 C 5392, Amended Memorandum Opinion, December 13, 1984, slip op. at page 21.

The Conference spoke in its earlier testimony of the problem of retroactivity that infects both old and new state legislation. Vickery Manor simply ratifies the fact that state legislation is finally of little or no help.

There is one critical fact that is too often lost but must be recognized in this debate. The Sherman and Clayton Acts are federal acts - they emanate from this Committee and from your counterpart Committee on the House side. Federal courts have exclusive jurisdiction over federal antitrust claims. The acts attempt to articulate a national policy regarding competition. Any solution which looks to the state legislatures to cure the problems created by Boulder will be at variance with the fundamental federal interest and activity in promoting uniform, national antitrust policy and enforcement.

Quite simply, activities that are deemed to be in violation of the federal antitrust laws should be subject to scrutiny and remedies whether they take place in South Carolina or Pennsylvania or Texas or Ohio or wherever. With the decision in the Unity Ventures v. County of Lake (Grayslake) case out of Northern Illinois, we now face the spectre of local governments and their officials facing personal liability of $28.5 million in a fight over access to sewer services. However, in the same circuit, access to sewer services conditioned on annexation has been held to be a traditional governmental function entitled to state action immunity - at least under Wisconsin law. Town of Hallie v. City of Eau Claire, 700 F.2d 376 (CA 7, 1983), cert.pending, May 11, 1983, No. 82-1832. While we should pay vast deference to state laws and the way in which states want to regulate their local governments, almost identical behavior, with no showing in either case of overreaching or improper motive, surely should not result in the federal law immunizing one city and its officials and imposing multimillion dollar damages on another city and its officials.

The uncertainty of the applications of the federal antitrust laws to local government activities is troubling enough. The additional need to confront state law and the vagaries of the fifty states' laws as they will be interpreted by the federal judiciary is truly an awesome task for local government officials and lawyers.

Mr. Chairman, I wanted to speak for a moment on a few of the primary issues confronting this Committee as you attempt to draft workable legislation in response to Boulder.

1. THE ROLE OF THE STATES IN ANTITRUST SCRUTINY OF CITIES

At the beginning of the hearings that this Committee held in June of 1982, the Chairman read a letter from the organizations representing governors, state legislators and attorneys general asking that the Committee exercise some restraint in acting on

Boulder until the states were able to develop their policy position. Mr. Chairman, you also suggested that it would be in the best interests of all parties if the states and local governments could come to some compromise on these issues. Now, after two years of discussions, the state and local groups have come to agreement on most of the ancillary issues surrounding Boulder. For example, we agree that "active supervision" by the state should not be required for the actions of local governments. We are close to agreement that treble damages should not be available against local governments although there is some sense that additional damages might be appropriate in cases of egregious behavior.

Still, two years later, after significant litigation against local governments, the state and local government groups are in disagreement over two fundamental issues. The states, and others, have counseled restraint, feeling that the courts will finally evolve workable rules for antitrust scrutiny of cities. In fact the Courts of Appeal have been remarkably sensitive to the needs of local governments as they review post-Boulder cases. We feel that the willingness of the Courts of Appeal to find in favor of local governmental action is merely additional evidence that the standards seemingly imposed by Lafayette and Boulder are unworkable both as to the antitrust laws and as to intergovernmental relations.

The state and the local groups disagree on the source of the immunity, whether it flows from the states or the federal law, and on the question of burden. Whose burden is it either to arrange appropriate protections for local governments from the antitrust laws, or to clarify the extent to which and the means by which local governments must comply with the antitrust laws?

The real Nemesis of Boulder is that it simply fails to comport with 20th Century notions of intergovernmental relationships - that throughout the United States the home rule movement has sought to return as much control as is possible to the levels of government closest to the people, cities and counties. Current notions of federalism have even called for returning program and financing responsibilities to states and local governments where they can be more effectively managed and controlled.

A singular difficulty with the Boulder analysis is that it looks to the state legislature as the embodiment of the "state" and requires all local governments to look to state legislation for any antitrust immunity that might be available. This creates a paradox for home rule jurisdictions in strong home rule states such as California, Colorado and Georgia where the legislature is prohibited by the state constitution from acting in areas of local concern. Those areas are left, by the constitution, to the home rule jurisdiction. Consequently, those home rule cities and counties are unable to go to the state legislature for help and the legislature is incapable of providing the kinds of protections that Boulder would require.

Whatever form the federal legislation finally takes, it should, at a minimum, and in furtherance of a respect for federalism, recognize the allocation of power and responsibilities between states and their local governments whether that allocation is made by state statute or the state's constitution. It is incongruous for the existing relationships between states and their subdivisions to have to be redefined to comply with the Federal Sherman Antitrust Law.

The Conference of Mayors has always agreed with the proposition found in S.1578 that local governments must be acting within their authority under state law to have state action immunity. In fact, local governments can only operate under state law, they are creatures of the state. The application of the antitrust laws under Boulder standards, however, creates the difficult problem of United States district courts sitting with exclusive federal jurisdiction making determinations over the validity of local government action under state law. This prospect violates our sense of federalism; it should violate the states' sense of federalism. Should the federal legislation recognize the need for the exhaustion of state remedies or the application of a harmless error rule to allow the district courts to defer questions of violations of state law to competent state-level judiciaries? Or, do we want to see the creation of a new federal common law, under the Sherman Act, concerning ultra vires acts of local governments under state law?

The questions asked above are real. Just last week the Supreme

Court heard arguments in Davis v. Scherer, No. 83-490, which questions whether a state official's violation of state law abrogates his good faith immunity under federal law where he has not violated any clearly established federal law.

Finally, I want to address the burden issue. In most states most jurisdictions are subject either to Dillon Rule oversight or to statewide laws that supercede local home rule determinations. The state legislatures are fully capable in most circumstances of making their determinations as to their policy on the displacement of competition and of requiring adherence to that policy by their local governments. Most of the states have their own antitrust statutes which they can amend to express their legislative policy of promoting competition. In addition, numerous other state remedies and protections are available to parties injured by improper local governmental action. State sunshine and open records statutes are designed to promote fairness. State conflict of interest and bribery statutes are designed to deter wrongdoing. Federal civil rights and interstate bribery statutes are also available to deter wrongdoing by local governments and their officials. Still, with this panoply of protections and remedies available, the states have taken the position that their local governments should return to them to be reauthorized, now with the Sherman Act in mind, to do what they had already been authorized to do.

The Conference of Mayors position is that the Congress should determine the reach of the federal antitrust laws, within the existing structure of state and local constitutional and statutory relations, and that the states should make their own determinations, under their own authority as to their commitment to competition in the marketplace for themselves and for their local governments.

2. THE GOVERNMENTAL-PROPRIETARY DISTINCTION

Just last term in Jefferson County Pharmaceutical Association v. Abbott Laboratories, 103 S.Ct. 1011 (1983) the Supreme Court found that state and local governments may be subject to the proscriptions of the Robinson-Patman Act at least to the extent that they were purchasing drugs at discounts and then reselling them in competition with private retailers. S.1578 picks up on this idea by writing it into positive law. Our position is that the "governmental-proprietary" distinction should not be written explicitly into the statute. The real difficulty in writing this legislation is that almost all parties agree that there are some actions that might be taken by state or local governments that should be covered by the antitrust laws. More often than not, these actions will be "proprietary," that is, a government engaging in a business regularly carried on in the community in direct competition with private businesses.

What we fail to appreciate is that the "governmental-proprietary" distinction is merely a tool for analysis that courts have used for decades to measure and weigh the relative nature of a government action to see if it should be subject to the rules applciable to governments or to the rules applicable to private business. It is a tool, not a doctrine. The courts should continue to use it, and we would suggest that the legislative history emanating from these hearing should indicate that the tool is one that can be used to assess local action. But, as a tool, it should not be written into positive law. Otherwise, every action by governments will be characterized as "proprietary" by plaintiff's lawyers just to create another issue of law or fact for the court to review. One amici brief in the Boulder case suggested that the fact that Boulder received a 2% franchise fee made Boulder a full proprietary partner in the business.

As a tool, the distinction will allow courts to analyze the relative value of public and private actions. It provides the flexibility to recognize, for example, that certain activities of local governments, such as ambulance services, might be revenue producing, but that does not, of necessity, make the "proprietary." Our view is that states and local governments should be on notice that if they enter the private market place and compete directly with private businesses, they have to comply with the antitrust laws. We feel that that can best be accomplished through the legislative history.

3. REMEDIES AND DAMAGES AGAINST LOCAL GOVERNMENTS AND OFFICIALS

There has been a great deal of speculation over the application of the treble damage remedies of the Clayton Act to local governments. The Supreme Court itself seems to have reserved the question in footnotes in both Lafayette and Boulder. However, the two courts that have reached the issue have not been deterred. Affiliated Capital Corp. v. City of Houston, 700 F.2d 226 (CA 5, 1983), rehearing en banc granted, argument held January 9, 1984, imposed a $6.3 million personal judgment against a former mayor. Unity Ventures v. County of Lake, No. 81 C 2745 (N.D. Ill. E.D., jury verdict January 12, 1984, post verdict motions are pending) found the trial judge trebling to $28.5 million a $9.5 million verdict against a village, a county and three local officials.

The threat of treble damage liability chills local officials in the performance of their duties. As the threat is also personal, it may well discourage conscientious citizens from running for office. As Justice Rehnquist noted in his dissent in Boulder, it will be difficult for the courts to escape the mandatory language of the Clayton Act imposing treble damages. Any legislation on this issue should remove the threat of damages against cities and individual officials. Again, the law books are replete with alternative remedies for wrongdoing and the addition of the antitrust sword of treble damages adds little but fear and confusion to the actions of local governments and their officials. Most of the antitrust cases we have seen are also brought as civil rights cases. While cities are not subject to liability for punitive damages under the civil rights statutes, see, City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981), local officials can still be held liable for punitive damages under a very loose standard, see, Smith v. Wade, 51 U.S.L.W. 4407 (1983). The findings in Unity Ventures were under both the antitrust and the civil rights statutes. There just is no need for the additional monetary remedies provided under the antitrust laws.

Mr. Chairman, thank you for this opportunity to appear before you today. Local governments throughout the United States are trembling in fear and uncertainty over this issue. The Unity Ventures, Grayslake case has served to move local officials up a notch or two on the Richter Scale. Grayslake is only the first of what promises to be a slew of verdicts against local governments and elected officials by juries confronted with conflicting and evolving standards of proof and of evidence and of the sufficiency of state law. We feel that there are adequate remedies already available under both federal and state law to protect the public and private businesses from overreaching or unfair activities of local government entities. The addition of the antitrust laws to this array of remedies creates a new and virulent strain of litigation and harassment that private parties can use to challenge government activity. Accordingly, we ask that Congress adopt legislation giving local governments and officials the same protections as those afforded to the states and their officials when the local governments are acting validly pursuant to their general or specific enabling state authority.

The CHAIRMAN. The committee will come to order.

Our next witness is Hon. Milton Handler of the law firm of Kaye, Scholer, Fierman, Hays & Handler in New York City.

Mr. Handler, we are delighted to have you here. We appreciate your being present to testify. We will be glad to hear from you at this time.

STATEMENT OF HON. MILTON HANDLER, LAW FIRM OF KAYE, SCHOLER, FIERMAN, HAYS & HANDLER, NEW YORK, NY

Mr. HANDLER. Mr. Chairman, I appear to support the proposition that the vulnerability of local governments to heavy antitrust liability as a result of the unfortunate decision in the *Boulder* case requires a legislative solution. We cannot sit back and wait for the Supreme Court to resolve the difficult and puzzling questions raised by this decision. If the rulings from *Goldfarb* to *Boulder* are any criterion, we can only expect further confusion from a court torn with disagreement on all aspects of the State Action Doctrine, and its next decision is more likely to increase the murkiness, obscurities and contradictions of its prior inconsistent holdings than to clarify them.

S. 1578, however, in my opinion, is a halfway measure, as are the various bills proposed by the National League of Cities and the U.S. Conference of Mayors. It does not cut to the root of the State action problem, of which *Boulder* is but a part. Putting local governments on the same footing as the States merely takes them out of the fire and puts them into the frying pan together with the States.

No one reading the hosts of cases in the lower courts that have been spawned by the Supreme Court's recent decisions, with their many plurality, concurring, and dissenting opinions, can escape the conclusion that the lot of the States in this area is far from being a happy one. The two-pronged *Midcal* test which purports to synthesize the prior decisions seems simple and uncomplicated on its face, but its application has brought to light vexing questions of interpretation that have confounded the lower courts and produced contradictory decisions on essentially the same state of facts.

These are the *Midcal* standards:

First, the challenged restraint must be "one clearly articulated and affirmatively expressed as State policy"; second, the policy must be "actively supervised" by the State itself.

I shall not burden the committee with a review of the case law on what satisfies the clearly articulated and affirmative expression standard or what meets the condition of active supervision. The point I want to stress is that antitrust immunity today is not based on an understandable and workable legal principle such as preemption, but on what are, at least in part, questions of fact which must be determined enactment by enactment. Indeed, the Supreme Court has reiterated that the validity of State action must be determined on a case-by-case basis. In other words, it is only through the expensive and time-consuming process of litigation that one can find out whether a specific State regulatory statute has clearly articulated its purpose to replace competition with regulation or monopoly public service and provides for active supervision by the State. There are at least 38,000 local governments with authority to enact regulations or to engage in a variety of business activities. No one has ever calculated the number of local ordinances that might be exposed to antitrust attack: What solace can local governments derive from Federal legislation which merely relieves them of the *Boulder* requirement of express delegation of authority from their States but subjects them to the exacting, rigorous and unpredictable *Midcal* standards?

There must be some better way of resolving the antitrust predicament of the States, their agencies, local governments or private parties who have complied with the demands of State or local law.

To find a viable solution, it is important to return to first principles, and take into account some fundamental aspects of American history. The Founding Fathers created a federation of sovereign States, dividing power between the national Government on the one hand and the States on the other. At the time the Sherman Act was passed, and for the ensuing half century, the Federal antitrust laws, as a matter of constitutional law, had no application to the local trades now subject to the obscurities of *Boulder*. This only came about as a result of the judicial revolution in the thirties when the Court, reversing itself, upheld the principal New Deal enactments.

Justice Stone, in *Parker*, was eminently correct when he asserted that neither Senator Sherman nor the Congress in 1890 intended that the new law apply to State or local enactments where regulation was a surrogate for enforced competition. Indeed, the basic reason why Congress enacted the Sherman law was that the State laws forbidding restraints of trade were inapplicable to the monopolistic acts of the trusts and the large combines because the States could not regulate interstate commerce. Hence the adoption of a Federal law based on the same restraint of trade principles as prevailed under State law. Congress in 1890 was not unmindful that it was customary in England, the colonies and the States "to regulate ferries, common carriers, hackmen, bakers, milliners, wharfingers, innkeepers, et cetera, and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished and articles sold."

To find a viable solution, we must, in my view, bear in mind that ours is a federalism with rights and responsibilities vested in the States and their subdivisions and that the enactments of both State and local governments of the kind now under challenge are deeply rooted in our history. The States and local governments have employed the regulation of local trades and industries or their own ownership and operation of various types of enterprise as a surrogate for competition in the free market both before and since the Sherman Act was put on the books.

My basic proposition is that what we have here is a local problem that should be handled on a local basis. We ought not to saddle the Federal courts with the impossible burden of examining and purging the incalculable number of State and local ordinances, whose validity under *Midcal* can only be determined on a case-by-case basis. All of the States today have antitrust laws; they have vigorous and vigilant attorney generals; they have elaborate judicial systems; they thus have the means to address the problem of removing from the shelter of their own laws improper and unconscionable restraints of trade and monopolistic acts and practices which should not be tolerated. Why should not the States, in coping with a local problem, determine whether their own enactments or the enactments of their local governments conform to their antitrust laws, and if they do not, to invalidate them under State rather than Federal law?

It is interesting to note the essentially local nature of the arrangements passed upon by the Supreme Court in the spate of decisions starting with *Goldfarb*. That case dealt with the minimum fees of lawyers practicing in Virginia and was concerned primarily with local representation and litigation. *Cantor* had to do with free light bulbs given to local consumers of electric power. *Bates* was concerned with local advertisements of local lawyers seeking private local clients. *Lafayette* deals with the anticompetitive activity of a municipal electric company. *Midcal* invalidated legislation governing resale price maintenance and price posting for local wine wholesalers and retailers. *Boulder* involved cable television aiming at local patronage. *Ronwin*, now pending before the Supreme Court, has to do with the claimed reduction of the number of persons that may be admitted to the local bar through the manipulation of the grading of bar examinations.

I submit, Mr. Chairman, that there is not a single set of facts involved in these opinions which have caused so much anxiety to State and local governments, that involves any subject matter of national concern. It is not anything the Congress normally deals with, and why the U.S. Supreme Court should have stretched out to assume jurisdiction over purely local matters that are better handled on a local basis is something that I am unable to understand, particularly at a time when the Court is so overburdened and where the Chief Justice is constantly making addresses about the necessity for providing some calendar relief to the lower Federal courts.

What national interest was involved in any of these cases warranting the time and energy devoted to their determination by the Supreme Court and the lower Federal courts? Would Federal antitrust law and policy have suffered if the Court had not implicated itself in this problem at this time?

Similarly, the cases at the lower court levels deal with such local regulations as zoning, local sewage disposal, use of sewage as a fuel to generate electricity, local taxis, ambulances, water services, and the like.

Is it not plain that the subject matter of these litigations relates to local problems that in our federalism should be solved locally?

Indeed, I understand it is a policy of this administration to return to the States the governance of matters that ought not to attract the attention and action of the Federal Government. I would say this is a very good place to start.

The central government has plenty of problems of national concern crying out for attention. The Federal courts are overburdened and are not the proper instrument for curbing whatever abuses have crept into State and local regulatory legislation. I submit that a proper division of responsibility would be for the States to concern themselves with the reconciliation of their enactments with their own antitrust laws and that the Federal Government should confine itself to antitrust enforcement of cartels and monopolies of national scope. By a parity of reasoning, the private treble action in the Federal courts should likewise be so limited.

I would therefore propose that the Congress enact a moratorium against public and private suits in the Federal courts for a period of years during which the States will be given the opportunity of determining the validity of both State and local laws under State antitrust legislation and to clarify their policy on whether they want to return their trades and industries to the unrestrained competition of the free market.

These are policy matters that ought to be determined by the elected officials of State government.

The moratorium legislation should make clear that it is the sense of Congress that this is a State responsibility that should be promptly discharged to make certain that improper anticompetitive conduct is not sheltered by such regulatory and monopoly service statutes. Federal jurisdiction should be resumed, if at the end of the moratorium period, it appears that the States have not undertaken this necessary task. I recognize this is a radical proposal, and therefore, I suggest as an alternative that the Federal courts could be authorized to decline jurisdiction where the impact of State or local laws, ordinances, and regulations is primarily local and the effect on interstate commerce is indirect and insubstantial, as was true in these various cases affecting the legal profession, for example, that went up to the Supreme Court.

Even where the effect of such laws may be direct and substantial, the Federal courts in their discretion should be empowered to stay any action, private or public, challenging such enactments, pending a determination by the State courts or administrative bodies as to whether the challenged laws conform to the requirements or State antitrust or unfair competition legislation.

Late last year, I made an analysis of the legislation proposed by the National League of Cities and the U.S. Conference of Mayors, which I have now slightly revised, and a copy of which I would like to have included as an exhibit to my statement, since it goes into aspects of the law which I have not had time to cover in my testimony.

I am also requesting that legislation which I and one of my partners drafted to deal with the State action problem in a more comprehensive way be likewise included as an appendix to my statement, assuming that my more radical proposal is unacceptable.

This statute which I drafted, Mr. Chairman, is built very much on 1578 but supplements 1578 by dealing with the various problems raised by *Midcal* and a host of other cases that have followed the Supreme Court decision.

I have brought with me a series of articles which I have published from time to time covering the developments in this field which I would like to submit to the chairman for possible use by the committee and its staff, but of course, not to be included in the record. To bring up to date my own writings, I am adding a paper which my partner, Richard Steuer, delivered at a symposium which I arranged at the New York City Bar Association last fall on October 12, 1983.

These writings, I think, comprehensively cover the State Action Doctrine from its initiation in *Parker* v. *Brown* down to today.

I thank the committee for providing me with this opportunity to outline my views on this most perplexing subject.

The CHAIRMAN. Thank you very much. We appreciate your testifying.

Mr. HANDLER. May I offer these statements and writings for the record?

The CHAIRMAN. Did I understand you are suggesting a moratorium on all actions or just against State and local governments?

Mr. HANDLER. Mr. Chairman, I am a little deaf and I did not hear you.

The CHAIRMAN. Are you suggesting a moratorium on all antitrust actions or just those against State and local governments?

Mr. HANDLER. Just those against the States as well as local governments.

The CHAIRMAN. How about the all antitrust actions?

Mr. HANDLER. My proposal is limited to all public or private antitrust actions challenging the validity of the State or local enactments under the Federal antitrust laws and claiming that *Parker* v. *Brown* provides no shelter from such attack.

The CHAIRMAN. Thank you very much.

We may submit some more questions to you and we would like you to answer them for the record. Thank you very much.

[Draft bill and memorandum follow:]

Handler/Steuer Draft
October 1983

98th Congress
1st Session S.____________

IN THE SENATE OF THE UNITED STATES

_______________________introduced the following bill; which was read twice and referred to the Committee on ___________________.

A BILL

To clarify the application of the Federal antitrust laws to the actions of State and local governments.

Whereas it is the intention of Congress that the antitrust laws of the United States shall not apply to duly enacted State or local laws, ordinances or regulations which authorize actions by governmental officials or private persons pursuant to an express or implied policy of a State or one of its political subdivisions to permit competition to be replaced with regulation or monopoly public service;

Whereas Congress finds that nothing in the language of the Federal antitrust laws or their legislative history indicates that the purpose or intent of these laws is to preempt, or to deny an exemption for laws, ordinances or regulations duly enacted or adopted by a State or its political subdivisions which permit competition to be replaced with regulation or monopoly public service;

Whereas Congress finds that nothing in the language of the Federal antitrust laws or their legislative history indicates that these laws are intended to apply differently to a State than to a political subdivision of a State acting within the scope of its general or specific enabling legislation or authority;

Be it therefore enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

(A) That Title 15 of the United States Code is amended by adding a new Chapter 66, entitled "Application of Antitrust Laws to State and Local Governments," as follows:

"Sec. 3910.(a) The antitrust laws, as defined in Sections 12 and 45(a) of Title 15 of the United States Code, shall not apply to actions duly authorized by the laws, ordinances or regulations of a State or political subdivision pursuant to a policy of such State or political subdivision to prohibit certain forms of competition or to permit competition to be replaced with supervised regulation or monopoly public service.

"(b) The antitrust laws shall apply to laws, ordinances or regulations promulgated by a political subdivision of a State acting within the scope of its general or specific enabling legislation or authority, and to actions taken pursuant to such laws, ordinances or regulations, only to the extent that the antitrust laws would apply to comparable laws, ordinances or regulations of a State itself, or actions taken pursuant thereto.

"(c) Where the impact of such State or local laws, ordinances and regulations is primarily local and the effect on interstate commerce is indirect or insubstantial, the Federal courts are directed not to entertain any action challenging such laws, ordinances or regulations as violations of the Federal antitrust laws. Notwithstanding that the effect of such laws, ordinances and regulations on interstate commerce may be direct and substantial, the Federal courts, in their discretion, may stay any action challenging such laws, ordinances or regulations as violative of the antitrust laws pending a determination by the State courts or administrative bodies whether the challenged laws, ordinances or regulations conform to the requirements of state antitrust or unfair competition legislation.

"(d) For purposes of this section the following definitions will apply:

(1) 'State' means the States and territories of the United States and the District of Columbia;

(2) 'Political subdivision' means any duly constituted political subdivision of a State, the governing body of which is popularly elected, including, but not limited to, municipalities, counties and townships;

(3) 'Authorized action' includes permitted action, and is not intended to be limited to action which is compelled or directed;

(4) 'Supervised' means subject to oversight by a State

or political subdivision or agents or officers of a State or political subdivision. There should be a presumption that where a mechanism exists for overseeing regulation or monopoly public service, such regulation or monopoly public service is 'supervised' within the meaning of this section and is not a sham.

"(e) In cases brought under 15 U.S.C. ¶ 15 in which, notwithstanding paragraph (a) of this section, the antitrust laws are held to have been violated by actions of a State or political subdivision, or of private parties under color of State or local laws, ordinances or regulations, damages will be limited to the damages sustained, without trebling or other increase.

"(f) There shall be no criminal liability under the antitrust laws for actions which are authorized by facially valid enactments or pronouncements of a State or political subdivision."

(B) The Federal Trade Commission is hereby directed, pursuant to Section 6(d) of the Federal Trade Commission Act, to investigate and report its findings and recommendations to the Congress on whether conduct authorized by state or local laws, ordinances or regulations, as administered, shelter actions that may be inconsistent with the purposes and goals of the Federal antitrust laws and which are not an effective surrogate for unregulated competition.

MEMORANDUM

This memorandum seeks to appraise the legislation proposed in 1982 by the National League of Cities and the United States Conference of Mayors to overcome the effects of the Supreme Court decision in the Boulder case. To place these bills in proper perspective, it is desirable to analyze the deficiencies in the present law requiring correction and to determine what is the best legislative approach to accomplish the proponents' objectives.

Let me review briefly some of the problem areas which face us:

(1) The immunity of state or local action has traditionally rested on one or the other of two basic legal principles, namely preemption or exemption. The issue is phrased in these terms -- have state or local laws replacing competition with regulation or monopoly public service been preempted by the Sherman Act, or are such laws exempted from the application or reach of that Act? Both of these principles present serious difficulties. The plurality decision in Boulder restricts the preemption analysis to the actions of the sovereign states. Only state laws can co-exist with the federal, and then only if it is shown that Congress has not occupied the field to the exclusion of the states or that it was not its intent to preclude the states from legislating on the same subject matter notwithstanding that such legislation might be inconsistent with the federal law.

Because the laws of local political subdivisions cannot be validated on preemption grounds under Boulder, they can only be sheltered if there is state legislation specifically authorizing the local enactment. General authorization such as the Home Rule provisions in state constitutions is insufficient. What Boulder requires, however, is rarely to be found in the laws of the several states. Moreover, it manifestly is hopelessly impractical for each state legislature to enact legislation which will specifically authorize or ratify the thousands of municipal ordinances presently on the statute books so as to make the local political subdivisions state agencies within the meaning of and for the purposes of the state action doctrine. Hence, if antitrust immunity is to be enjoyed by local governments to the same extent and subject to the same rules as state bodies, the federal antitrust laws will have to be amended.

There are intimations in the Boulder plurality opinion that this may not be constitutionally possible. I see no reason, however, why the Congress cannot exclude local as well as state action from the operation of the federal antitrust laws on the basis of preemption if it so minded. Indeed, contrary to the Boulder decision, in my view, that is what Congress in fact did almost a century ago when it passed the Sherman Act. However, we must recognize that in the proposed bill we are plowing new ground and that the Supreme Court may balk at extending preemption beyond what it believes are its constitutional limits.

(2) We must recognize that the Boulder decision does not merely cast local regulatory and monopoly public service enactments into a limbo, but under its ratio decidendi all enactments touching upon activities that are subject to federal legislation other than antitrust have likewise been put in jeopardy. This was pointed out by Justice Rehnquist, who cited prior Supreme Court decisions which applied preemption to such local enactments as the Smoke Abatement Code of the City of Detroit, Huron, Portland Cement Co. v. Detroit, 362 U.S. 440 (1960) (holding that code was not preempted by federal steamship inspection laws); and a curfew on jet flights imposed by the City of Burbank, City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624 (1973) (holding that curfew ordinance to be preempted by Noise Control Act of 1972).

I raise for consideration the question whether new legislation should be confined to the antitrust area. However, to determine the kinds of laws that have been made vulnerable by Boulder will obviously require considerable research. The proponents should consider whether they want to expand the scope of the measure they are sponsoring and, if so, to undertake the factual study which will be necessary for Congress to be properly informed.

(3) The exemption approach likewise presents some difficulties. The courts look at antitrust exemptions, whether express or implied, with jaundiced eyes. One or two quotations from the cases is illustrative of the Courts' hostility to implied or express exemptions from the operation of the antitrust laws which are accorded a supremacy of virtual constitutional dimension. For example, in United States National Association of Securities Dealers, 422 U.S. 694, 719-20 (1975) the Supreme Court stated that "implied antitrust immunity is not favored and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." In Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963) the Court observed: "repeal is to be regarded as implied only if necessary to make the [subsequent law] work, and even then only to the minimum extent necessary." Accord, National Gerimedical Hospital v. Blue Cross, 101 S.Ct. 2415 (1981). Similarly, in FMC v. Seatrain Lines, Inc., 411 U.S. 726, 733 (1973) the Supreme Court observed that "exemptions from antitrust coverage are strictly construed." Accord, United States v. Philadelphia National Bank, 374 U.S. 321, 348 (1963); United States v. McKesson & Robbins, Inc., 351 U.S. 305, 316 (1956). The Federal Trade Commission recognized the same thing in Coca Cola Co., 91 F.T.C. 517, 611-12 n.11 (1978) rev'd on other grounds, 642 F.2d 1387 (D.C. Cir. 1981); and Rubbermaid, Inc., 87 F.T.C. 676, 712 n.45 (1976). In Lafayette, moreover, Justice Brennan observed that the state action doctrine "necessarily must be considered in light

of the presumption against implied exclusion from coverage under the antitrust laws." 435 U.S. at 398. As he stated, "The presumption against repeal by implication reflects the understanding that the antitrust laws establish overarching and fundamental policies, a principle of which argues with equal force against implied exclusions." Id. at 399.

In drafting exemption legislation, this judicial attitude must be borne in mind.

(4) Both preemption and exemption depend upon Congressional intent. In finding no preemption in Parker v. Brown, Justice Stone relied upon the putative and hypothetical intent of Congress as of 1890. We are all familiar with the process by which the Supreme Court reconstructs the intent of Congress, generally on the basis of an ambiguous legislative record. It is not difficult in the normal case to find conflicting statements in hearings or in debates. Sometimes the legislative record is entirely silent on the crucial questions that are later litigated. I do not believe we should take any chance of a court later on questioning what the Congressional intent was in this instance. We are, therefore, raising for consideration the inclusion in the bill of a declaration of purpose which will clearly spell out the intent of Congress to validate local ordinances even where the political subdivision is not acting as the agent of the state and its enactment has not been specifically authorized by the state legislature. The success of the bill will depend on the clarity with which the Congressional purpose is expressed. I enclose a rough draft of the kind of declaration I have in mind.

(5) The draft places local legislation on a parity with statewide laws so far as the state action doctrine is concerned. This leaves both to the vagaries of the Supreme Court's reformulation of that doctrine. No one should be under any illusion that the bill provides a safe harbor for local ordinances. It is quite possible that a substantial

number of them will not meet the severe, exacting and fluctuating standards now prescribed by the Supreme Court.

The simplistic approach of Parker v. Brown has been abandoned. It was enough for Justice Stone that the states were adopting regulation as a surrogate for competition without the courts assuming the heavy burden of determining whether such regulation was adequate and effective in providing the public with the degree of protection accorded by free and unrestrained competition. The present approach is much more sophisticated but its contours have yet to be definitely fixed. The Court recognizes that the state action doctrine is in a state of flux. As Chief Justice Burger put it in his concurring opinion in City of Lafayette ". . . we should not treat the result in the Parker case as cast in bronze; rather the scope of the Sherman Act's power should parallel the developing concepts of American federalism." In short, the doctrine has not come to rest and the country has been put on notice that it is subject to change. What is meant by the developing concept of American federalism is as unclear as it is uncertain. Parker, true to the basic concepts of federalism, provided the states with ample latitude in the type of economic control it wanted to impose upon such local trade and industry, as had some impact on interstate commerce. The present Court is restricting powers heretofore assumed to be possessed by the states, however, thus narrowing the ambit of a federalism among sovereign governments and centralizing control in the federal courts. To me that is a developing centralization of power and not a developing federalism.

The diversity of opinion among the Justices is striking. Some, as has been mentioned, treat state action doctrine as a form of exemption; others as embraced by the preemption principle. Some reject the defense unless the challenged conduct has been commanded or compelled by the state -- it is not enough that it has been authorized or prohibited. Some have asserted that the defense is available only to state officials and not to private parties. In Boulder, Chief Justice Burger, in his concurring opinion, suggested that in every case there must be a determination whether the exemption from federal law "was necessary in order to make the regulatory Act work and 'even then only to the minimum extent necessary,'" a view echoed by Justice Marshall in his separate concurrence.

The present rubric, which seemingly is supported by most of the Justices, is that anticompetitive conduct is immune only when it is carried on pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation or monopoly public service and is actively supervised by the state or one of its agencies. On its face, this may appear to establish a workable and administrable standard, but what is the meaning of clearly articulated or active supervision?

Let's see how the lower courts construe these tests. At least three courts have now held that private conduct must be "compelled" in order to satisfy the requirement that it be taken pursuant to a "clearly articulated and affirmatively expressed" state policy, although that phrase is not otherwise defined. United States v. Southern Motor Carriers Rate Conference, Inc., 672 F.2d 469, 472 (5th Cir. 1982); Sound, Inc. v. AT&T, 631 F.2d 1324, 1334 (8th Cir. 1980); United States v. Title Insurance Rating Bureau, 517 F. Supp. 1053, 1059 (D. Ariz. 1981). The lower courts seem to judge "active supervision" more on the basis of intuition than anything else. Some courts have refused to find active supervision where a supervisory mechanism exists, but the court concludes that it has not been sufficiently active. See, e.g., Knudsen Corp. v. Nevada State Dairy Commission, 676 F.2d 374 (9th Cir. 1982); Schiessle v. Stephens, 525 F. Supp. 763, 777 (N.D. Ill. 1981). Other courts have found sufficient supervision simply from the existence of a supervisory body, Benson & Gold Chevrolet, Inc. v. Louisiana Motor Vehicle

Comm., 403 So.2d 13 (La. 1981), or from the mere fact that the state legislation continues to exist and the state can always amend or repeal its prior enactments. See, e.g., Morgan v. Division of Liquor Control, 644 F.2d 353 (2d Cir. 1981); Estate of James Effron v. Koslow, 173 Cal. Rptr. 93, 117 Cal. App. 3d 915 (Cal. Ct. App.), appeal dismissed, 102 S.Ct. 622 (1981); cf. Stauffer v. Town of Grand Lake, 1981-1 Trade Cas. (CCH) ¶ 64,029 (D. Colo. 1980). At least one court has now held that where a prohibition is involved, enforcement will suffice to constitute active supervision. See Gambrel v. Kentucky Board of Dentistry, 1982-2 Trade Cas. (CCH) ¶ 64,952 (6th Cir. 1982).

(6) While we want in the proposed legislation to take full advantage of both concepts of exemption and preemption, despite their limitations, as noted above, there may be available to us a better approach. Congress plainly has the right to define the coverage of any federal law, new or old, by appropriate action. This includes, of course, the Sherman law. It can be made clear, both in the legislation and in legislative history, that Congress does not intend the federal antitrust laws to have any application to local regulatory legislation or monopoly public service under the conditions specified in the bill. While this may appear to be only a play on words, I think that it has a firmer or more solid foundation than either exemption or preemption. In the final analysis, whatever the approach -- and I recommend all three -- the effectiveness of what we do will depend on our foreclosing any possible argument as to Congress' intent. It is Congress and not the Supreme Court that should have the controlling word on what it wants to accomplish in this legislation -- namely, a total repudiation of the Boulder decision and rationale.

(7) As of this writing, no one knows how many state or local laws are vulnerable to antitrust attack by reason of their possible non-compliance with the present tests prescribed by the Supreme Court. And the mystery or uncertainty,

if you will, will be accentuated if the Court in its next decision changes the standard as it has repeatedly done in the past seven years.[*] It is vital that both the states and the local political subdivisions, at least on a sample basis, be prepared to present to the Committee a summary of the legislation which they want Congress to validate. I doubt that the cities, to say nothing about the states which already enjoy the benefits of the state action defense, such as it is, are conscious of the dimensions of the problem for which they are seeking a federal legislative solution. How many of the local regulatory ordinances fulfill the Midcal requirements? And what about state legislation? The bill is concerned with local legislation but if the states cannot live with Midcal, shouldn't the Committee be so informed in order that it understand that it is being asked to correct one prong of the state action doctrine and is leaving untouched other prongs which condemn state and municipal action to antitrust penalties. Obviously, Congress should not be asked to legislate in the dark and the proponents of the draft bill should be required to inform the Committee of the concrete measures to which the bill will relate.

(8) The principal reason why the state action doctrine has been in a state of flux in recent years is because the courts and commentators believe that the Parker v. Brown defense sheltered actions by state and local officials, as well as private parties, which operate against the public interest and are not sufficiently controlled by the state and local authorities. Many Congressmen are likely to be leery about granting immunity for undefined conduct which may neither be economically or socially justifiable. No one has any difficulty

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[*] See Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Bates v. State Bar of Arizona, 433 U.S. 350 (1977); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978); New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. 96 (1978); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); Community Communications Co. v. City of Boulder, 50 U.S.L.W. 4144 (1982). See generally, Handler, M., Reforming the Antitrust Laws 59 (1982).

with trades and industries that are subjected to variants of public utility regulation where such regulation is something more than a mere paper tiger. Likewise, the states and local governments operate various businesses on a monopoly basis where traditionally it has been felt that public ownership is preferable to the unrestrained competition of free enterprise. There are enactments which prohibit conduct which would otherwise be permissible under the antitrust laws. There doubtless are laws which authorize or permit without adequate regulation or public control actions which are anathema from an antitrust point of view and which society cannot afford to tolerate. The proponents do not seek a broad validation of such actions. Their draft requires the local ordinances to pass muster under the Midcal test. But I do not believe that is enough. There should be presented to the Committee at the hearings descriptions of the type of controls which would be immune and those which would be subject to antitrust condemnation. The Committee is entitled to have this concrete information as the groundwork for its legislative effort and not be called on to deal with these difficult issues in a vacuum.

(9) The bill speaks of actions directed by a political subdivision. Is directed being used in the sense of command or authorization? Does it embrace prohibitory legislation? I would assume that Congress' intention would be to embrace legislation which compels, which authorizes or prohibits. This must be made clear to avoid later frustration should the Court limit exculpation to laws which command or compel action later challenged under the antitrust laws.

(10) What bothers me the most in the recent developments of the state action defense and in the legislation now proposed is that it is impossible in advance to know whether action taken pursuant to state or local law is or is not immune. How can anyone in advance determine whether the court will conclude that the purpose to permit anticompetitive conduct or monopoly public

service has been clearly articulated and how can anyone be sure that the supervision is sufficiently active to satisfy the court's present requirements? Boulder and Lafayette have opened a Pandora's Box of limitless scope and dimension. No one has counted how many state and local laws can now be challenged in suits by the Department of Justice, the Federal Trade Commission or by private parties. Most of the cases involved suits by private parties claiming that the actions of other private parties offend the antitrust laws. Anyone who engages in actions commanded, authorized or otherwise required by state or local law faces the dilemma that by complying with such laws they may be in violation of the Sherman Act and, if they do not comply because of the uncertainty, they can be charged with non-compliance with state or local requirements, sometimes involving criminal prosecution. In other words, they may be committing a crime whatever they do. This to me is intolerable. As I do not believe that any standard can be formulated with such crystal clarity that one knows whether he can safely observe or disregard local law, I believe that treble damages or the criminal sanction should not be applicable in this area of antitrust

My objection, however, cuts more deeply. The Pandora's Box that I mentioned is likely to engulf the federal courts with hundreds, if not thousands, of litigations. Are our overburdened federal courts in a position to take on this added responsibility? After all, the courts are not the only agency of government that can formulate policy or that should monitor the actions of the business community. I raise the question, therefore, whether this is not something that should be dealt with administratively and that there be no treble damage or criminal penalty until an administrative body such as the Federal Trade Commission has held that the local law does not meet the tests laid down by the Supreme Court. Thereafter, if the local law continues to be enforced, actions thereunder might be subject to the panoply of sanctions imposed by the antitrust laws. How practical this suggestion might be is something that should be explored.

(11) A series of statutory definitions as to what is meant by the terms supervision, direction, command, authorization and prohibition, as well as clear articulation of the legislation's noncompetitive objectives, may reduce some of the uncertainty that inheres in the present state action doctrine and its codification in the proposed bill.

(12) I have referred above to Chief Justice Burger's reference to the developing principles of American federalism. The federal government is not the only body that is available to curb the improprieties of actions allowed under state or local law. The states themselves have antitrust laws. The states themselves can apply a doctrine of exemption. The operations of trades and businesses under state or local law can be monitored by the states themselves. As a minimum, shouldn't this responsibility be shared by all sovereignties and not lodged in the federal government alone? Wouldn't that be more consistent with the kind of federalism which the Founders contemplated?

We must not overlook the fact that at the time the Sherman law was put on the books and for more than 40 years the prevailing concepts of what constituted interstate commerce by themselves precluded the application of the Sherman law to the conduct which Boulder has imperilled. The broadened concept of commerce now subjects what is essentially local action to federal antitrust law. While the federal law may thus be applicable, the fact still remains that the principal impact of the state and local legislation is intra rather than interstate and hence the primary responsibility for safeguarding the public interest lies with the states themselves.

Milton Handler

November 23, 1982

MH:dw

The CHAIRMAN. The last panel may come around now.

Mr. Carlos Smith from Chattanooga, TN, on behalf of the American Public Power Association; Michael Lovendusky, director of governmental relations, American Ambulance Association; Stewart C. Eggert, Hillsborough County Aviation Authority, on behalf of the Airport Operators Council International.

Mr. Smith, you may proceed now.

I have another hearing so I would like for you to try to limit your statement. Put your entire statement in the record and then try to summarize your statement in 5 minutes.

STATEMENTS OF PANEL CONSISTING OF CARLOS SMITH, ESQ., CHATTANOOGA, TN, ON BEHALF OF THE AMERICAN PUBLIC POWER ASSOCIATION; MICHAEL LOVENDUSKY, ESQ., DIRECTOR OF GOVERNMENTAL RELATIONS, AMERICAN AMBULANCE ASSOCIATION, WASHINGTON, DC; AND STEWART C. EGGERT, ESQ., HILLSBOROUGH COUNTY AVIATION AUTHORITY, TAMPA, FL, ON BEHALF OF THE AIRPORT OPERATORS COUNCIL INTERNATIONAL

Mr. SMITH. I do have a prepared statement which I will offer for the record.

First of all, on behalf of the American Public Power Association, we would like to commend the committee for its efforts to draft a statute that addresses the difficult issue of the application of antitrust laws to local government. This is indeed a serious problem which is having a chilling effect on legitimate municipal operations for several reasons:

Municipalities are seen as having "deep pockets" and are therefore inviting targets for potential litigants.

Fighting antitrust actions is extremely expensive. Even a successful defense can result in the expenditure of large amounts of public funds for attorneys' fees.

If a municipality is found in violation of the antitrust laws, it will probably be forced to pay treble damages. These awards will have to be paid from taxpayer or ratepayer moneys.

The threat of an antitrust lawsuit can be used as a bargaining tool by a private party desiring to encourage a municipality to act or not act in a particular way.

The legislative history of the antitrust laws suggests that Congress did not intend them to apply to States or municipalities. These laws were enacted to promote the public welfare by ending monopolistic practices by private corporations that destroyed competition in the marketplace.

As previous testimony before the committee has indicated, the problems associated with this task are difficult.

While we believe that an important goal of any legislation addressing local government immunity should be to remove confusion associated with the Supreme Court and lower court decisions on the subject, we are concerned that S. 1578 will engender greater confusion in several areas. Further, we are concerned that S. 1578 would significantly narrow the immunity that now appears to be available under *Lafayette* and its progeny. These specific problems are discussed below.

First, S. 1578 would restrict local government immunity now available under *Lafayette* and *Boulder*.

Second, limitation of immunity under S. 1578 to "general function units" may create confusion.

Third, any legislation should avoid use of the equivalent of the ambiguous "governmental-proprietary" distinction.

Fourth, S. 1578 would create confusion over the competitive standards to be used in its application.

Unlike the investor-owned utility which is permitted to conduct its business largely in private, the nonprofit municipal electric system is generally subject to the same constraints applicable to other governmental bodies. For example, meetings are conducted in public. Open forums are required by applicable sunshine State standards. Records are subject to disclosure by the States and under some State laws, public power system directors cannot even accept the advice of counsel except in meetings open to the press and public.

Abuses of power of municipal officials can be dealt with in any number of ways, including civil and criminal statutes. In addition, there is a device to curb abusive practices totally unavailable against private corporations—the electoral process.

APPA respectfully requests any legislation include immunity for all activities of local government authorized by State law whether by specific grant of authority, by general grant of authority or by home rule.

Without such legislation, antitrust risks will hinder countless governmental operations and significantly increase the cost of local governmental services.

We thank you for the opportunity to appear and present our views, and I will be pleased to answer any questions you may have.

The CHAIRMAN. Thank you very much.

Mr. SMITH. Thank you very much, Mr. Chairman.

[Prepared statement follows:]

STATEMENT OF CARLOS C. SMITH
CONCERNING THE APPLICATION
OF THE FEDERAL ANTITRUST LAWS
TO
LOCAL GOVERNMENTS

Mr. Chairman and Members of the Committee. I am Carlos C. Smith. I appreciate the invitation to appear before the Committee today to discuss the pending legislation to clarify the application of the federal antitrust laws to local government operations. I am a partner in the Chattanooga, Tennessee law firm of Strang, Fletcher, Carriger, Walker, Hodge & Smith, and devote a substantial part of my time to my duties as General Counsel for the Electric Power Board of Chattanooga, a municipal electric utility, and for the Tennessee Valley Public Power Association, an association of 156 municipal and cooperative electric utilities which distribute electric power generated by the Tennessee Valley Authority. Currently I am serving as Chairman of the Legal Section of the American Public Power Association (APPA), and it is the Association on behalf of which I present my views today.

The American Public Power Association is the national service organization representing more than 1,750 local publicly-owned electric utilities throughout the United States. The public power systems represented by APPA vary in size from very large retail power suppliers serving cities such as Los Angeles, Seattle, and Memphis, to much smaller publicly-owned electric utilities serving villages and towns.

We would like to commend the Committee for its efforts to draft a statute that addresses the difficult issue of the application of antitrust laws to local government. This is indeed a serious problem which is having a chilling effect on legitimate municipal operations for several reasons:

- Municipalities are seen as having "deep pockets" and are therefore inviting targets for potential litigants.

- Fighting antitrust actions is extremely expensive. Even a successful defense can result in the expenditure of large amounts of public funds for attorneys' fees.

- If a municipality is found in violation of the antitrust laws, it will probably be forced to pay treble damages. These awards will have to be paid from taxpayer or ratepayer monies.

- The threat of an antitrust lawsuit can be used as a bargaining tool by a private party desiring to encourage a municipality to act or not act in a particular way.

As previous testimony before the Committee has indicated, the drafting problems associated with this task are extremely difficult. While we appreciate the Chairman's efforts in this area, after careful review of S.1578, we believe that this legislation would significantly increase the antitrust threat faced by public power systems, their directors, and their managers, and should not be enacted in its present form.

At the outset it is important to understand that public and private corporations are fundamentally different. This is illustrated well by a review of the characteristics of public power systems. First, of course, they are publicly-owned, with the system assets typically acquired through bonds financed out of system revenues received from the consumer ratepayers. Second, they are operated on a non-profit basis, with the benefits of public ownership being shared by the consumers served by the system. All of the consumers share in the good or bad fortune of their systems, which typically have no source of financing other than the rates they charge for electric service. There are no stockholders to whom dividends are paid, no highly compensated officers or directors, no corporate perquisites. In some cases, the public power systems are operated as departments of the municipalities, supervised by the same elected and appointed public officials who supervise garbage service, fire protection, and police protection. In many other cases, the local public power systems are operated under policies established by elected or appointed citizen boards, whose members typically receive no compensation or merely nominal compensation. These public power systems are managed by professionals with engineering and business backgrounds who are typically paid only a fraction of the salary received by executives of comparable investor-owned utilities. They have no bonus arrangements or stock option plans dependent upon the financial performance of the electric utility. Directors and managers of public power systems serve the public at these lower levels of compensation out of a spirit of public service and in a desire to reap the intangible rewards that accompany actions for the public good. Unlike the investor-owned utility which is permitted to conduct its business largely in private, the municipal electric system is generally subject to the same constraints applicable to other governmental bodies. For example, meetings are conducted in public open forums as required by applicable state "sunshine" statutes. Records are subject to public inspection and disclosure by state freedom of information statutes applicable to other local government operations. And, under some state laws, public power system directors cannot even seek the advice of counsel except in meetings open to the press and the public.

Those who oppose the extension of antitrust immunity to local governments and their public power systems often suggest that it is only fair for governmental entities to face the same antitrust regulation as is faced by private organizations providing similar services. We disagree. Is it fair to ask a public power system board member to devote his time to community service at little or no compensation and yet face the same exposure to antitrust penalties as a director of an investor-owned utility making tens or hundreds of thousands of dollars a year? Is it fair for the citizens served by of a public power system to face higher electric rates as a result of the application of antitrust penalties just because the stockholders of an investor-owned utility might face reduced dividends because of antitrust exposure? Is it fair for a public power manager to face the same threat to his personal assets from antitrust exposure as an investor-owned utility manager receiving a salary perhaps three times as high?

The legislative history of the antitrust laws suggests that Congress did not intend them to apply to states or municipalities. These laws were enacted to promote the public welfare by ending monopolistic practices by private corporations that destroyed competition in the marketplace. Similarly, municipalities enact regulations to protect the public interest, but in certain instances this requires displacing competition. Unlike private concerns, however, there is no intent to gain a business advantage. Moreover, when private entities are found guilty of violating these laws, treble damages are paid from their illegally gained profits. In contrast, municipalities will have to pay damages from the public treasury.

Abuses of power of municipal officials can be dealt with in any number of ways, including civil and criminal statutes. In addition, there is a device to curb abusive practices totally unavailable against private corporations -- the electoral process.

Fundamentally, the risk of antitrust exposure to local governments and public power systems threatens the ability of these government units to provide efficient and timely services to their citizens and consumers. Leaders of local governments and public power systems are faced with the choice of foregoing activities that pose antitrust risks, thus paralyzing local government, or of subjecting themselves and their constituents to significant potential liability and expenses.

Before discussing what we perceive to be some of the problems associated with S.1578, we would like to briefly summarize our concept of the proper approach to be taken by any legislation dealing with immunity of local government activities. The fundamental problem with the current state of the law is the requirement suggested by the plurality in City of Lafayette v. Louisiana Power and Light Co.[1] and the majority in Community Communication Co. v. City of Boulder, Colo.[2] that the state must, with a high degree of specificity, authorize the displacement of competition by local government activity in order to shield the local government from antitrust liability. Fortunately, in the application of the Supreme Court standard, District Courts and the Circuit Courts of Appeal have generally taken a reasonable approach. Many of these courts have focused upon the fact that the plurality opinion in Lafayette, as applied by the Court in Boulder, only required "that the legislature contemplated the kind of action complained of."[3] Many of the lower courts have concluded that the legislature "contemplated" the use of allegedly anticompetitive acts based upon relatively general grants of authority.[4] However, the Supreme Court has yet to review any of these post-Boulder decisions, and substantial uncertainty exists concerning the type of state authorization necessary to permit a finding of state action immunity. We think that appropriate legislation should afford immunity from antitrust liability for local government actions that are generally authorized by state law. Those who would argue that local governments ought not be engaged in a particular activity for competitive reasons or otherwise would have the opportunity to convince the states to withdraw authority for local government activity in particular areas. Whether general state authority was continued or was withdrawn for specific activities, the local government would have a much greater degree of certainty that its activities would not expose it to antitrust liability.

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[1] 435 U.S. 389 (1978)

[2] 455 U.S. 40 (1982)

[3] City of Lafayette, supra, 435 U.S. at 415.

[4] See, e.g., Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency, 715 F.2d 419 (8th Cir. 1983); Gold Cross Ambulance, Inc. v. City of Kansas City, 705 F.2d 1005 (8th Cir. 1983), petition for cert. filed, 52 U.S.L.W. 3039 (July 25, 1983); Town of Hallie v. City of Eau Claire, 700 F.2d 376 (7th Cir. 1983), petition for cert. filed, 52 U.S.L.W. 3070 (May 11, 1983).

While we believe that an important goal of any legislation addressing local government immunity should be to remove confusion associated with the Supreme Court and lower court decisions on the subject, we are concerned that S.1578 will engender greater confusion in several areas. Further, we are concerned that S.1578 would significantly narrow the immunity that now appears to be available under Lafayette and its progeny. These specific problems are discussed below:

First, S.1578 would restrict local government immunity now available under Lafayette and Boulder. Under the Supreme Court tests outlined in Lafayette and Boulder, it seems clear that activities of all local government units can be immune from antitrust liability if a sufficiently clear state mandate is shown. Immunity does not depend upon whether the local activity was an exercise of regulatory authority or was undertaken in competition with private parties or whether the local government unit was responsible for general functions or more narrow special functions. The provisions of S.1578 limiting immunity to regulatory activities of general function units would significantly narrow the immunity afforded under present law and would prevent state governments from extending immunity to activities of many local government agencies.

Second, limitation of immunity under S.1578 to "general function units" may create confusion. Local government services and functions are provided under a wide variety of arrangements. Not only do the basic municipal entities vary greatly in their characteristics, but there have been established large numbers of authorities, commissions, boards, divisions, and departments that have differing degrees of autonomy and responsibility in relation to the basic governmental units. It is not clear to which of these organizations and entities the term "general function unit", as used in S.1578, would apply. No definition is provided in the bill, and I am aware of no generally recognized definition of the term. I can foresee extensive litigation simply over the question of whether a particular local government organization is itself a general function unit or is part of a general function unit.

Third, any legislation should avoid use of the equivalent of the ambiguous "governmental - proprietary" distinction. While the proposed legislation does not expressly draw a distinction between governmental and proprietary activities of local governments, it does appear that the bill's "regulatory-competitive" dichotomy would establish a similar distinction. This causes us substantial concern for we fear that such a distinction will result in the inconsistent application of the antitrust laws to local government.[5]

Mr. Justice Frankfurter in Indian Towing Co. v. United States, 350 U.S. 61 (1955), very aptly described the difficulties of trying to establish a federal policy based upon the governmental-proprietary distinction, when he stated:

> Furthermore, the Government in effect reads the statute as imposing liability in the same manner as if it were a municipal corporation and not as if it were a private person, and it would thus push the courts into the "non-governmental" -- "governmental" quagmire that has long plagued the law of municipal corporations. A comparative study of the cases in the forty-eight States will disclose an irreconcilable conflict. More than that, the decisions in each of the States are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound. The fact of the matter is that the theory whereby municipalities are made amenable to liability is an endeavor, however awkward and contradictory, to escape from the basic historic doctrine of sovereign immunity. . . .

350 U.S. at 65

Mr. Justice Frankfurter also noted:

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[5] The difficulty of basing federal policy on a standard similar to the governmental - proprietary distinction is illustrated by the litigation spawned by the decision in National League of Cities v. Usery, 426 U.S. 355 (1976). In Usery, the Supreme Court held that the Tenth Amendment prevented the application of federal legislation to states if the application interfered with the states' sovereign power and "directly displace[d] the States' freedom to structure integral operations in areas of traditional governmental functions . . . ." 426 U.S. at 852. See, e.g., Federal Energy Regulatory Comm'n v. Mississippi, 102 S.Ct. 2126 (1982); United Transp. Union v. Long Island R. Co., 102 S.Ct. 1349 (1982); Hodel v. Virginia Surface Min. & Reclam. Assn., 101 S.Ct. 2352 (1981); San Antonio Met. Transit Auth. v. Donovan, 557 F. Supp. 445 (W.D. Tex. 1983), cert. granted, 104 S.Ct. 64.

> . . . [I]t is hard to think of any governmental activity on the "operational level," our present concern, which is "uniquely governmental," in the sense that its kind has not at one time or another, been, or could not conceivably be, privately performed.
>
> There is nothing in the Tort Claims Act which shows that Congress intended to draw distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation.

350 U.S. at 68

Mr. Justice Stewart echoed these sentiments in his dissenting opinion in City of Lafayette v. Louisiana Power and Light Co., 435 U.S. 389 (1978), in which he disagreed with the Chief Justice's suggestion that the governmental - proprietary distinction should be used to determine antitrust immunity:

> The separate opinion of The Chief Justice does nothing to make these distinctions any more substantial or understandable. Indeed, even a moment's consideration of the range of services provided today by governments shows how difficult it is to determine whether or not they are "proprietary." For example, if a city or State decides to provide water service to its citizens at cost on a monopoly basis, is its action to be characterized as "proprietary"? Whether it is "proprietary" or not, it is surely an act of government, as are the petitioners' actions in this case.

435 U.S. at 434 (footnotes and citation omitted).

The distinction between governmental and proprietary or corporate acts of municipalities has been most fully developed in the context of municipal tort liability. Under the traditional formulation, municipalities could not be held liable in private actions for torts when the municipalities were performing "governmental" functions. This doctrine of tort immunity for acts in a governmental capacity is based upon the concept that a municipality is undertaking governmental functions as a representative of the sovereign state and is acting for the public benefit instead of for the benefit of private interests. As, one commentator has noted:

> "The reason is that it is inconsistent with the nature of their powers that they should be compelled to respond to individuals in damages for the manner of their exercise. They are conferred for public purposes to be exercised in their prescribed limits, at discretion, for the public good; and there can be no appeal from the judgment of the proper municipal authorities to the judgment of courts and juries."

18 E. McQuillin, Municipal Corporations (3d Ed. 1977), at 207-08. (herein "McQuillin").

While municipalities have generally been held to be immune from tort liability for "governmental" activities, in the absence of statute they have been subjected to tort liability when involved in private, corporate, or proprietary functions. The line between governmental and proprietary activities has never been clearly drawn. It has been further obscured by judicial efforts to expand opportunities for tort recovery by injured persons. This has led to "an erosion [of immunity] through an expansion of the categories of 'proprietary' activities", and has resulted in "a wide divergence in the decisions as to what functions are governmental or public and what are private or corporate, and functions held to be governmental in some jurisdictions are held to be corporate in others." McQuillin, at 202.

The National Institute of Municipal Law Officers ("NIMLO") recently completed a survey of antitrust suits that have been brought against municipalities. The results of this survey were submitted to the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary in a hearing held March 29, 1984. According to the NIMLO survey, among the areas of municipal activities that have most frequently been the subject of antitrust suits have been airport operations, sewer system operations, garbage and waste collection activities, hospital operations, and ambulance services. There is significant disagreement among state and federal courts over whether each of these activities is governmental or proprietary in character.[6]

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[6] Decisions discussing the governmental or proprietary character of municipal activities are collected in McQuillin's treatise on municipal law, supra. As to airports, see McQuillin § 53.96; as to sewer systems, see McQuillin § 53.125; as to garbage and waste collection, see McQuillin § 53.46; as to hospital operations, see McQuillin § 53.86; as to ambulance operations, see McQuillin § 53.86, nn. 6, 7.

Fourth, S.1578 would create confusion over the competitive standards to be used in its application. Ignoring the policy arguments that support extension of immunity to activity that may be in competition with private parties, the exclusions from immunity contained in the bill may engender great confusion. This is because the "competition" that is required to invoke the inception to immunity is not defined. Is a public power system that has a natural monopoly in a community in competition with a neighboring investor-owned utility that theoretically could expand into the municipal service area? Is a community's garbage collection service in competition with private parties because private parties could provide garbage collection if the local government deemed it appropriate? Should antitrust concepts of relevant geographic market and relevant product market be applied to the determination of whether competition exists? And, if so, should the relevant geographic and product markets be more broadly drawn as, for example, in the case of conspiracy claims under Section 1 of the Sherman Act or more narrowly drawn as in the case of monopolization claims under Section 2 of the Sherman Act? Since issues of relevant geographic and product market involve detailed questions of fact, they seldom can be resolved in antitrust litigation without extensive discovery and, often, trial. Will it be necessary to undertake similarly burdensome discovery to determine what immunity shall be granted to the local government, and will the issue always be one that can only be resolved at trial?

While more than 1,750 communities in the United States have taken advantage of the opportunity to own and operate their own electric utility, there is serious concern that the pending bill would deprive any additional communities of the advantages of public power because of the language "excluding any activity involving the sale of goods or services by the unit of local government in competition with private persons . . . ." Very clearly, any community desiring the opportunity to own and operate its own electric power system, would face a substantial hazard under the federal antitrust laws if S.1578 is enacted in its present form. That hazard would be a threat not only to the new, publicly-owned electric utility, but also to the public treasury of the municipality because of its legislative decision to create the utility. At least under existing law, a local government, if authorized by a clearly articulated state policy, could organize and operate a municipal electric utility without substantial risk that its displacement of a private utility would give rise to an antitrust cause of action.

In one respect, municipal electric utilities are unlike other entities which may be engaged in "any activity involving the sale of goods or services . . . in competition with private persons." The municipal electric utilities are, by their very nature, engaged in monopoly public service. It is indeed rare for there to be two suppliers of electric service, one municipal, and the other investor-owned, competing for the sale of electricity to the same ultimate retail purchaser. A high area of potential antitrust exposure for the municipal electric utility is in the same area as that of general government functions of municipalities, that of the award of contracts to those desiring to do business with the municipal electric system. However, the vulnerability of the municipality and the municipal electric system under S.1578 would be strikingly different. For example, under the proposed Senate legislation a company engaged in the business of clearing rights-of-way might be in a position to maintain a lawsuit alleging an antitrust claim against a municipal electric utility for anti-competitive conduct in awarding a contract for clearance of an electric transmission right-of-way to a competing contractor. However, the same kind of suit against a municipality for awarding the same kind of contract for clearing a right-of-way for highway construction might be shielded with immunity.

There is just as much need to protect the funds of the municipal electric utility from the risk of an antitrust judgment as there is to protect the funds of local government in its traditional governmental activities. Whether these funds are produced by the taxpayer or produced the ratepayer, those citizens are generally in substantially the same position in relationship to their local government in its governmental capacity as they are to their local government in its operation of the municipal electric utility. The funds of a municipal electric utility are generally regarded as "municipal funds".[7]

In conclusion, the American Public Power Association urges the adoption of legislation that will afford immunity from antitrust liability for local government activities that are generally authorized by state law. We believe such legislation is essential to the continued effective operation of our American system of local government.

To confer antitrust immunity upon local government is not to leave those who deal with local government without a remedy for alleged wrongful acts or the intrusion of local government into a proprietary area.

Most importantly, the people, speaking through their State legislatures, can prohibit municipal activity in those proprietary activities which the State believes should be exercised only by the private sector. There will also continue to be antitrust remedies for those in the private sector who allege they are victims of an anticompetitive conspiracy between their competitor and local government. There will continue to be a remedy under Section 1983 of Title 42, U.S.C.A., for those who claim to be the victim of unlawful or unconstitutional action on the part of local government. And to those who are served by municipal electric systems, there will continue to be a remedy should they be able to show they have not received the non-discriminatory service to which they are entitled under general principles of public utility law.

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[7] See, e.g., Tennessee Attorney General Opinion 83-401, (September 12, 1983).

Immunity under the antitrust laws should be conferred upon all activities of local government, whether in a governmental or proprietary capacity. Aside from the litigation which likely will be created by such a distinction, we agree with the dissent of Mr. Justice Stewart in Lafayette where he stated that there is no basis for a distinction between "governmental" and "proprietary" activities:

> In [the Chief Justice's] view, municipal utilities are subject to antitrust liability when they engage in "proprietary enterprises," . . . but apparently retain their antitrust immunity for other types of activity . . .. The Chief Justice's approach seems to be just as mistaken as the plurality's.

435 U.S. at 434

When S.1578 was introduced, one of the stated purposes, as recorded in the Congressional Record of June 29, 1983, was "to modify Boulder and Lafayette." APPA respectfully requests that this modification include immunity for all activities of local government authorized by state law, whether by specific grant of authority, by general grant of authority, or by home rule. Without such legislation, antitrust risk will hinder countless local government operations and significantly increase the cost of local government services.

Thank you, Mr. Chairman and members of the Committee.

RESOLUTION
ON
MUNICIPAL ANTITRUST LIABILITY

WHEREAS, in 1978, the U.S. Supreme Court, in City of Lafayette, Louisiana v. Louisiana Power and Light Company, ruled that actions of municipalities were subject to review under the Federal antitrust laws unless the State had specifically authorized the municipalities to engage in such actions, thereby extending to the municipalities the State action exemption from the Federal antitrust laws, and

WHEREAS, in 1982, the U.S. Supreme Court expanded the potential antitrust liability of municipalities by holding, in Community Communications Company v. City of Boulder, Colorado, municipal ordinances including those adopted by "home rule" municipalities could be challenged on Federal antitrust grounds, and

WHEREAS, these two cases have resulted in an explosion of litigation against municipalities on antitrust grounds, creating a chilling effect on the exercise of legitimate municipal operations, due in part to fear over expenses involved in defending an antitrust suit, whether or not meritorious, and in part to the fact that treble damages under the Federal statutes must be awarded when antitrust liability is established, and

WHEREAS, municipalities, like states, must exercise certain regulatory responsibilities, in some cases electing, in the public interest, to displace competition with regulation, and

WHEREAS, promotion of competition and preservation of the principles underlying the Federal antitrust statutes are elements which must be evaluated in determining whether proposed municipal ordinances or actions are in the public interest, but public interest decisions must not be based solely on antitrust considerations, a result which would seem to be required under the recent Supreme Court decisions, and

WHEREAS, the electoral process, traditional controls exerted over public officials, and other legal remedies present sufficient opportunities to challenge municipal actions, making unnecessary the application of Federal antitrust statutes or municipal actions, and

WHEREAS, the justification for the state action exemption from Federal antitrust liability would seem to apply equally to actions of municipalities, and

WHEREAS, the Supreme Court has recognized that States may extend to municipalities their antitrust immunity; however, the Court has also indicated that a general grant of such immunity would not be adequate, and

WHEREAS, specific grants of immunity by States to municipalities to permit them to engage in certain activities without fear of challenges on antitrust grounds would require considerable State legislation due to the diversity of municipal operations, and even such specific grants might not be found adequate due to the need for local governments to act based on changing circumstances and conditions;

NOW, THEREFORE, BE IT RESOLVED: that the American Public Power Association urges the Congress to remove this impediment to the free exercise of legitimate municipal functions by amending the Federal antitrust statutes to exclude from their coverage actions by municipalities.

--Adopted May 25, by members of the American Public Power Association at
the 1982 Annual Conference held in New Orleans, Louisiana

The CHAIRMAN. Mr. Lovendusky.

Mr. LOVENDUSKY. Good afternoon, Mr. Chairman. I am Michael Lovendusky representing the American Ambulance Association.

I ask that my prepared testimony be placed in the record in its entirety.

The CHAIRMAN. Without objection, your statement will be placed in the record and you may proceed as you desire.

Mr. LOVENDUSKY. The American Ambulance Association, Mr. Chairman, is comprised of more than 600 private ambulance companies from every State of the Union. The men and women of our organization save hundreds of lives a day by their efficiency, expertise, and resourcefulness. In many localities across the Nation, they compete with and complement municipal and county ambulance services.

When you and I pull to the side of a road to allow an ambulance to pass, we are not aware whether the ambulance service is privately or publicly operated. It does not much matter to us as bystanders. To the individual being transported inside, the important thing is that he or she is transported as quickly as possible.

The mix of private and public ambulance service existing today guarantees the needed response. The legislation being considered by this committee and its counterpart in the House inadvertently undermines the private ambulance industry in varying degrees and ultimately could jeopardize the efficacy of emergency medical transportation in the United States. For that reason, the members of the Association are gravely concerned about legislative efforts to exempt local governments from the Federal antitrust laws since, in many localities, such exemption could threaten the very existence of private ambulance operations.

From the viewpoint of the private ambulance industry, there is no pressing need for for action on this legislation this year. Workable standards have been set by the U.S. Supreme Court. Those standards are being disseminated through and clarified by the Federal judiciary system. Four Federal circuit courts of appeals have clarified these standards in opinions consistent with one another and with those of the Supreme Court.

It is the concern of the American Ambulance Association that the Congress could throw the baby out with the bath water on this issue. The baby is an important baby: It is none other than the benefits of free enterprise and the preservation of free markets at the microeconomic level. If there is a problem with Federal antitrust laws on the part of some local governments, it is because they are aggressively expanding their activities into areas heretofore the domain of private enterprise. The reason in many instances is to enhance revenue bases by undertaking profitable commercial enterprises. Local governments should, in the area of commercial endeavor, compete on an equal footing with private enterprise. There seldom will be justification for giving local governments monopolistic advantages in activities heretofore within the ambit of private enterprise.

The problems that exist, if they exist, are State problems, not Federal ones. The proper recourse of local governments with doubts as to the propriety of any particular activity is to the State legislatures through the advocacy of their elected State legislators.

Attached to my prepared testimony, attachment 1, is an example of just such an effort being undertaken before the California Assembly at this time.

The association acknowleges the sensitivity that S. 1578 demonstrates to private enterprise. Much discussion has been heard about the problems which arise in attempting to define proprietary or commercial versus governmental activities on the part of local governments. A grey area in S. 1578, for example, is its exclusion of any activity involving the sale of goods and services by the unit of local government in competition with private persons. Would such an exclusion allow municipalities or counties to exclude private entrepreneurs from entering the locality where there is no private enterprise now? If so, a dual system of emergency medical transportation services could develop to the disadvantage of the United States.

From the viewpoint of the American Ambulance Association, there are only two areas in this issue which may deserve congressional examination at this time. They are: (1) the degree of supervision needed for State action immunity to apply to a local government activity; and (2) the issue of remedies—that is, whether treble damages are, in fact, too threatening, and whether compensatory and/or injunctive relief might be more appropriate.

The CHAIRMAN. Thank you very much.

[Prepared statement follows:]

STATEMENT OF
MICHAEL LOVENDUSKY, ESQ.
ON BEHALF OF
THE AMERICAN AMBULANCE ASSOCIATION

GOOD AFTERNOON, MR. CHAIRMAN and members of the Committee. I am Michael Lovendusky, representing the American Ambulance Association. The Association is comprised of more than 600 private ambulance companies from every State of the Union. The men and women of our organization save hundreds of lives a day by their efficiency, expertise and resourcefulness. In many localities across the nation, they compete with and complement municipal and county ambulance services. When you and I pull to the side of a road to allow an ambulance to pass, we are not aware whether the ambulance service is privately or publicly operated. It does not much matter to us as bystanders. To the individual being transported inside, the important thing is that he or she is transported as quickly as possible. The mix of private and public ambulance service existing today guarantees the needed response. The legislation being considered by this Committee and its counterpart in the House inadvertently undermines the private ambulance service industry in varying degrees and ultimately could jeopardize the efficacy of emergency medical transportation in the United States. For that reason, the members of the Association are gravely concerned about legislative efforts to exempt local governments from the Federal antitrust laws, since in many localities such exemption could threaten the very existence of private ambulance operations.

Local Governments Should Apply to Their State Legislators for Exemption from Federal Antitrust Laws When and If Needed

The Association does not believe that this issue deserves the fuss raised by the proponents of exemption. If a local government needs exemption from the Federal antitrust laws, then the local government has recourse through its duly elected State legislators to obtain State action exemption. This is the proper political route for local governments to follow in our federal system of government. See, e.g., Attachment 1, California Assembly Bill No. 3153, 1984. State legislatures are far better suited to weigh the pros and cons of local government monopoly in particular local activities than is the Congress. Today we hear much rhetoric on the blessings of both competition and increased State responsibility. This legislation flies in the face of both of these ideas, and the negative consequences of monopoly argue forcefully against any blanket local government exemption from the antitrust laws.

Local government monopoly will threaten effective emergency medical transportation services in our country.

Blanket exemption from the Federal antitrust laws will allow municipalities and counties to monopolize ambulance services in order to seize profitable enterprise for their revenue needs. Services will not likely be improved. Such a situation occurred in California recently. See Springs Ambulance v. City of Rancho Mirage, et al., No. 82-5917 (C.D. Cal. 1983). In this case, cities and a county organized a local government ambulance service, passed ordinances to destroy a private ambulance company's competitiveness, and fixed rates as well as emergency dispatching in an anticompetitive way to drive the private company out of business. The local government would have lessened ambulance services in the locality, and driven a private company with 16 years of excellent service to a community out of business for no good reason at all. See Attachment 2, "Federal Laws Can Make Good Neighbors," Ambulance Industry Digest, April, 1984.

Passage of legislation lessening the applicability of the Federal antitrust laws to local governments could multiply these situations.

Private Ambulance Companies Preserve Quality and Cost-Effectiveness

Private ambulance services provide important emergency failsafes in every community, even if that community has a local government ambulance service. In communities without adequate private ambulance services, tragedies may occur as a result of dependence on local government bureaucracy. A notorious example of this occurred in Dallas, Texas one month ago, when a dispatcher for the Dallas Fire Department screened a request for an ambulance in such a manner that rescue was delayed. The citizen died while the dispatcher argued with the emergency caller, demanding to speak to the dying individual. *See* Attachment 3, "Emergency Calls -- Red Tape Nightmare," ABC News *Nightline*, March 6, 1984.

Private ambulance companies provide a standard of service and cost which is lost in communities served exclusively by government ambulance services. Legislation to exempt local governments from antitrust laws may increase local government revenue, but not necessarily improve, or even maintain, the existing high-quality emergency medical transportation service provided by private ambulance companies.

Monopoly Breeds Corruption

The profitability of ambulance operation will increase the temptations of favoritism and could result in corrupt practices. The ability to award profitable monopoly franchises to particular ambulance services could be too much a temptation to elected local officials who often serve for little or no pay. Sadly, such corruption and favoritism already exist with regard to local government operation of ambulance services. In Alhambra, California, for example, the city mayor was convicted of corruption for his participation in a scheme to award an exclusive city franchise for provision of ambulance service in exchange for a pay-off. See Attachment 4, "The Ideal World" (Editorial) and "Infuence Peddling Backfires," Journal of Emergency Medical Services, April, 1984. Passage of legislation exempting local governments from the rigors of competition will place too much responsibility on local officials. It will threaten private ambulance service and local government integrity precisely in the communities most in need of multiple ambulance services and trustworthy officials, i.e., the small municipalities and counties of America.

The Association appreciates that S. 1578, the bill particularly before us today, is sensitive to the value of private enterprise. In that regard, S. 1578 is far superior to those bills currently before the House Judiciary Subcommittee on Monopolies which would exempt local governments from the operation of the antitrust laws to the same extent States are exempt from the operation of such laws. The Association also recognizes that in some areas of activity the concerns of local government representatives may be at least partially justified. But in the area of emergency medical transportation services there is no justification for exempting local governments from the antitrust laws or giving local governments monopoly advantages. Private ambulance companies provide invaluable service in matters concerning life and death. Healthy competition now exists between private and local government ambulance services in many localities which would be endangered by any relaxation of the antitrust laws. Emergency medical transportation in the United States is the best in the world as a result of the benefits of competition. Nothing is broken here. Please don't fix it.

ATTACHMENT 1

CALIFORNIA LEGISLATURE—1983–84 REGULAR SESSION

ASSEMBLY BILL No. 3153

Introduced by Assembly Member Bronzan

February 15, 1984

An act to add Section 1797.85 to the Health and Safety Code, relating to emergency medical services.

LEGISLATIVE COUNSEL'S DIGEST

AB 3153, as introduced, Bronzan. Emergency medical services.

Under existing law, the Emergency Medical Service Authority in the Health and Welfare Agency has been assigned various responsibilities with respect to the methods employed in providing emergency medical services.

This bill would state the intent of the Legislature with respect to the degree of state direction and supervision over emergency medical services. The bill would also define "exclusive operating area" for purposes of those services.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. (a) It is the policy of the State of California to ensure the provision of effective and efficient emergency medical care. The Legislature finds and declares that achieving this policy has been hindered by the confusion and concern in the 58 counties resulting from the United States Supreme Court's holding in Community Communications Company, Inc. v. City of Boulder, Colorado, 455 U.S. 40, 70 L. Ed. 2d 810, 102 S. Ct. 835, regarding local governmental liability under federal antitrust laws.

(b) It is the intent of the Legislature in enacting this act at the 1983–84 Regular Session of the Legislature, to prescribe and exercise the degree of state direction and supervision over emergency medical services as will preclude the incurrence of liability under federal antitrust laws for activities undertaken by local governmental entities in carrying out their prescribed functions under Division 2.5 (commencing with Section 1797) of the Health and Safety Code.

SEC. 2. Section 1797.85 is added to the Health and Safety Code, to read:

1797.85. "Exclusive operating area" means a subarea of an EMS area defined by the emergency medical services plan for which a county grants an exclusive operating permit to an emergency ambulance service or provider of limited advanced life support or advanced life support.

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ATTACHMENT 2

THE WASHINGTON CORNER

Michael Lovendusky

Federal Laws Can Make Good Neighbors

It is not unusual to hear of the Federal Government using the antitrust law to go after private businesses accused of price fixing and other anti-competitive acts. But it is unusual to hear of private business using the antitrust law to go after governments for the same kinds of wrongs. And when the private business arming itself with the antitrust laws is an ambulance business, it is something we all want to take a look at, because there might be something to learn that could be of use in our own backyards.

Springs Ambulance Service, Inc. has provided emergency medical transportation service to the desert communities in Riverside County, California for 16 years. Yet, its history of service to the general community was not enough to stop some short-sighted local politicos from trying to drive Springs out of business. In early 1982, the county and three cities collaborated to establish their own, single ambulance service - and to eliminate Springs from the neighborhood. The monopolists tried three tricks to bring Springs to its knees:

1. They refused to refer emergency calls to Springs, knowing that 75% of Springs' revenue was generated from responding to emergency calls;
2. They promulgated ordinances and resolutions requiring Springs to post and adhere to a schedule of maximum rates to be charged for ambulance services; and,
3. They priced their own ambulance services below actual costs.

Rather than bringing Springs to its knees, the monopolists brought Springs to the courts. Springs sued the county and the cities, accusing them of restraint of trade, price fixing, and anti-competitive practices.

The county and the cities claimed immunity from the antitrust laws under the state action doctrine - a judicial doctrine which holds that the Congress did not intend to regulate state action when it exercised its power to regulate interstate commerce by enacting the antitrust laws. The county and cities claimed immunity be cause they were state governmental entities, and urged the court to dismiss Springs' complaint.

But cities and counties don't get the state action immunity just because they are cities and counties. For the state immunity to extend to political subdivisions within the state, the subdivisions must prove that their anti-competitive activity was specifically authorized by the state legislature with the intent to displace the federal antitrust laws. Moreover, the U.S. Supreme Court has established a two-prong standard against which to test a state subdivision's claim to state action immunity. First, the challenged anti-competitive activity must be clearly stated and firmly expressed by the state legislature as state policy. Second, the activity must be actively supervised by the state itself.

The county and the cities could not meet either standard. They tried to sew a laundry list of state statutes and regulations together to be the clearly articulated, affirmatively expressed state policy needed to meet the first test, but the court would not buy it. As to the second test - that the anti-competitive actions against Springs were actively supervised by the state itself, well, the county and the cities didn't even try to come up with something that looked like a state supervisory review of their activity.

The court refused to buy the county and city motion to dismiss, and held that they were covered by the federal antitrust law just like any other person or business.

If there is a moral to the story, it is an American one. In our country, even governments must follow the laws. If a government in your neighborhood becomes a bully, there probably is a law someplace to cut it back down to size.

The Washington Corner will be a regular feature in The **Ambulance Industry Digest**. Questions on law or government affairs and suggestions for topics are invited. Names will be withheld upon request.

Michael Lovendusky was born in farm country, Pennsylvania, outside of Harrisburg, in 1953. He is the eldest of five children. He studied English and Philosophy at The John Hopkins University in Baltimore and the University of Edinburgh in Scotland. After graduation, he moved to Washington, D.C. and was employed in the U.S. House of Representatives as a Legislative Assistant to two California congressmen for three and two years respectively. Mr. Lovendusky attended the Georgetown University Law Center at night during the time he worked in the Congress, earning his Juris Doctor in 1981. A member of the District of Columbia Bar, Mr. Lovendusky has worked for The David Epstein Group, a law firm engaged in general litigation and health law practice, since 1981.

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ATTACHMENT 3

ABCNEWS
7 West 66th Street, New York, N.Y. 10023
Transcripts: Nightline, Box 234, Ansonia Station, New York, N.Y. 10023
Press contact: Kim Edmonds (212) 887-4995

March 6, 1984
Show #737

NIGHTLINE

Emergency Calls — Red Tape Nightmare

In Washington
TED KOPPEL .... Anchorman

Guests

In Washington
HAL BRUNO .... ABC News Political Director
JEFF GREENFIELD .... ABC News
In Dallas
LELANI STARKS .... Supervising Nurse
Chief MICHAEL JONES .... Dallas Fire Department
In Salt Lake City
Dr. JEFF CLAWSON .... Salt Lake City Fire Department

Reports from ABC Correspondents

STEVE SHEPARD, in St. Petersburg, Florida
JACK SMITH

WILLIAM LORD .... Executive Producer

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ABC NEWS NIGHTLINE **Air Date:** March 6, 1984

Emergency Calls — Red Tape Nightmare

TED KOPPEL: Good evening. I'm Ted Koppel and this is Nightline.

LARRY BOFF: What do I have to do to get an ambulance out to this house?

DALLAS DISPATCH: You have to answer the nurse's question.

Mr. BOFF: All right. What are they, before she dies? Would you please tell me what the hell you want?

KOPPEL *[voice-over]***:** It was a nightmare, an emergency call for an ambulance in Dallas that ended with a patient dead before any help was sent. Could it happen in your community? We'll talk with a Dallas Fire Department official and with a nurse in charge of screening emergency calls. Also tonight, another big victory for Gary Hart, this time in Vermont — and evidence of more to come.

[commercial break]

KOPPEL: It happens, we suspect, more often than it should. The call for emergency help to police or hospital or fire department, the call which becomes entangled in red tape. Usually, though, nobody dies, and usually there is no precise record of the call made public. A few weeks ago in Dallas, Texas, however, there was just such a call. Someone did die, and there is a record. Correspondent Jack Smith has the story.

JACK SMITH *[voice-over]*: This is the Dallas Fire Department's dispatch office. On the night of January the 5th, a Dallas resident, 40-year-old Larry Boff, called here for an ambulance. His 60-year-old stepmother, Lilian, was having difficulty breathing.

DALLAS DISPATCH: Fire Department.

LARRY BOFF: Yes, I'd like to have an ambulance at 2627 Matawan Place.

DALLAS DISPATCH: What's your problem, sir?

Mr. BOFF: I don't know, and if I knew I wouldn't be calling you all.

DALLAS DISPATCH: Are you the one that needs the ambulance?

Mr. BOFF: No, I am not, it's my mother.

DALLAS DISPATCH: May I let you speak with the nurse?

Mr. BOFF: Oh, bullshit!

SMITH *[voice-over]*: Nurses routinely screen emergency calls in Dallas, and it was nurse Billie Myrick who screened this one.

NURSE: And what is the problem there?

Mr. BOFF: I don't know. If I knew I wouldn't be needing you.

NURSE: Sir, would you answer my questions, please? What is the problem?

Mr. BOFF: She's having difficulty in breathing.

NURSE: How old is this person?

Mr. BOFF: She is 60 years old.

NURSE: Where is she now?

Mr. BOFF: She is in the bedroom right now.

NURSE: May I speak with her, please?

Mr. BOFF: No, you can't, she seems like she's incoherent.

NURSE: Why is she incoherent?

Mr. BOFF: How the hell do I know?

NURSE: Sir, don't curse me.

Mr. BOFF: Well, I don't care. Your stupid-ass questions you're asking. Give me someone that knows what they're doing — why don't you just send an ambulance out here?

NURSE: Sir, we only come out on life-threatening emergencies.

Mr. BOFF: Well, this is a life-threatening emergency.

NURSE: Hold on, sir, I'll let you speak with my officer.

SUPERVISOR: Hello.

Mr. BOFF: Yes, what do I have to do to get an ambulance out to this house?

SUPERVISOR: You have to answer the nurse's questions.

Mr. BOFF: All right, what are they, before she dies? Would you please tell me what the hell you want?

SUPERVISOR: Well, I tell you what, if you cuss one more time, I'm going to hang up the phone.

Mr. BOFF: Well, I'll tell you what. What if it was your mother in there and she can't breathe — what would you do?

SMITH *[voice-over]*: As the minutes ticked away, the supervisor put nurse Billie Myrick back on the line.

NURSE: Okay, sir, I need to talk to her still.

Mr. BOFF: You can't, she is incoherent.

NURSE: Let me talk to her, sir.

Mr. BOFF *[to roommate]*: Would you please tell her that she's incoherent, that she cannot talk?

She cannot talk at all.

NURSE: Why?

Mr. BOFF: Well, how am I supposed to know?

NURSE: Well, then give her the phone.

Mr. BOFF *[to roommate]*: Give her the phone in there, give her the phone in there so that she can— I know she can't talk, but they want to talk to her, but she can't talk.

[to nurse] Forget it. I'll call the main hospital around here, all right?

NURSE: Okay, bye-bye.

SMITH *[voice-over]*: Boff tried calling that hospital but was told it couldn't send an ambulance. Boff's roommate, Dennis Fleming, then made a second call to the fire department.

NURSE: Are you the same man I was talking to earlier?

DENNIS FLEMING: No, that was my roommate.

NURSE: Uh-huh. Why can't I talk to the lady?

Mr. FLEMING: She cannot talk.

NURSE: Why?

Mr. FLEMING: She is incoherent. I mean she's just out of it. In fact, he's going in there now; he thinks she's dead.

NURSE: What do you mean by "out of it"?

Mr. FLEMING: Incoherent.

Mr. BOFF: She is dead. She is dead now. Thank you, ma'am. Would you please send an ambulance? Would you please send an ambulance here?

SMITH *[voice-over]*: Eight minutes after the first call, an ambulance was at last dispatched, but Boff's stepmother was already dead. Boff is asking the city of Dallas for $315,000 in damages. Nurse Billie Myrick is on leave while the fire department completes its investigation. This is Jack Smith for Nightline.

KOPPEL: When we return, we'll talk live with the Dallas Fire Department official who's investigating this case and with the supervisor of the department's nurse-call screening system.

[commercial break]

KOPPEL: With us now live at our affiliate WFAA in Dallas is Michael Jones, section chief of the emergency dispatch system of the Dallas Fire Department, which is investigating the incident we're discussing tonight. And Lelani Starks, supervisor of the nurse-call screening program for the Dallas Fire Department. Ms. Starks, I'm sure you've heard that tape more times than you care to. Can you explain to an audience that probably has desperate fears that that kind of thing might happen to them someday, how is it possible that that sort of thing can happen? How can there be that kind of confusion on a call like that?

LELANI STARKS, supervising nurse: I wish I had a simple explanation, you know, for them, but I really don't. I'm still having some problems understanding it myself. So I don't have any, you know, very pat explanation as to how it could happen.

KOPPEL: Well, what kind of instructions are your nurses under? What are they supposed to do when they get a call like that?

Ms. STARKS: Okay, they're supposed to dispatch an ambulance. Okay, we have what — we have policies and guidelines, and we have a policy that is called a third-party call policy. And that policy clearly states that when someone calls and they're too young or too old or too confused, you know, which could be hysterical or screaming or whatever, that you're to dispatch an ambulance and not to try and screen that particular call.

KOPPEL: Now, in this case, granted, the man did use a couple of cuss words, but I mean all things considered, he was relatively under control and he was being quite precise about what the problem was — she was having trouble breathing. As soon as the nurse heard that, that the patient was having trouble breathing, the ambulance should have gone out right away, shouldn't it?

Ms. STARKS: Yes, it should have.

KOPPEL: Why was it — let me turn for a moment to Chief Jones. Chief Jones, why was it then when, I gather, one of your men got on the phone — I mean, you know, let's not mince words; a "hell" or a "damn" must have been heard a couple of times in the fire department in Dallas. He can't have been that offended by a couple of cuss words that he threatened to hang up on the man. Is that— I mean I just— maybe you can explain to me how that sort of thing can happen?

Chief MICHAEL JONES, Dallas Fire Department: Certainly not. I don't really believe that that is the case. I don't believe really that Captain Green had any intention at all of hanging up on the man.

KOPPEL: But he said it.

Chief JONES: I know he said it. I think sometimes when people call in and they are hysterical, or appear to be hysterical sometimes, you have to shock them just a little bit to get them to settle down and answer the questions. The program is designed to help people, and that's the intent of it and that's what we're trying to do. The action in this particular situation — we here, again, really have no excuse for.

KOPPEL: I guess what I'm trying to get to with this, and maybe you can explain, give me a little more context so it becomes a little more understandable. I guess you get an awful lot of calls from people who are calling for ambulances who really don't need them. How do you manage to— you've got fairly scarce resources, you only have so-and-so many ambulances to go around — how do you draw the line? What are the instructions that your people are under to find out that fine difference between someone who desperately needs help and somebody who can probably get along without it?

Chief JONES: Okay. You're correct, we have 18 MICUs to cover—

KOPPEL: What's an MICU?

Chief JONES: Mobile intensive care unit. These are advanced life support units and they're basically designed for advanced life support. We have 18 of them to cover an area of roughly 400 square miles and to take care of a million people. This creates a problem, obviously. If we send on every call that comes in, which we're not in competition with the private ambulance companies by a longshot — we would like to see the private ambulance companies pick up part of the business that is nonemergency. We want to keep these units, these mobil intensive care units, available for the most critically ill, for those situations when we do really need them.

KOPPEL: So what are the guidelines?

Chief JONES: The guidelines are basically the protocol that we have. We have an established protocol that covers most instances. Obviously we hire qualified people, or we attempt to hire qualified people. Our nurses are all a four-year— you know, or registered nurses, plus they've done four years in emergency or critical care, with at least one year being in ICU or CCU. These nurses have to make subjective judgments at times, but if— I guess what it boils down to, if there's a doubt about a situation, then send, and you don't really have any problems.

KOPPEL: If it's that simple, then I guess in this case, as you said earlier on, there really isn't any excuse, either in the nurse's case or in the officer's case who answered the phone.

Chief JONES: When a call's referred back to an officer, back to the shift duty officer, that call really actually becomes his call at that time. He should gather the information, he should make his own judgment, and there again: if that doubt remains, he should send.

KOPPEL: All right. Chief Jones, Ms. Starks, thank you both very much indeed. In a moment, we'll talk with an expert on fire department emergency procedures.

[commercial break]

KOPPEL: We're having some technical problems in Salt Lake, so we're unable to go to our expert there; let's head back to Dallas and let me go once again to Chief Jones. The investigation, your departmental investigation. Is it over?

Chief JONES: No, it's not.

KOPPEL: What is taking so long about it?

Chief JONES: Since this program has aired, we've received several other complaints. People are coming out and coming forward and offering up more information, and certainly we're going to take these complaints and look into each and every one of them. And I feel this is going to give us a real good opportunity to evaluate our program, find out if we really have some problems and where we have the problems, and also gives the chance to turn it around and prosper from these mistakes, if they are mistakes or if there really are additional needs.

KOPPEL: When you talk about people coming forward with additional complaints — additional complaints in terms of this particular case, or a number of other cases?

Chief JONES: We don't know yet, Ted. We really haven't had time to get into this. This program aired the first time last night, I guess, and we were besieged with calls at that time. Now, most of these are not really complaints related to service or to the nursing problem. The complaints that we're discovering right now are just— it's more of an opinion situation where people are expressing opinion about the employment of the nurse or what disciplinary action should be taken. But certainly we are getting a few more complaints, people stepping forward now and asking us to make an inquiry.

KOPPEL: We've solved our technical problem, I believe. Joining us now live from our affiliate KTVX in Salt Lake City is Dr. Jeff Clawson, fire surgeon for the Salt Lake City Fire Department and the creator of a fire department emergency medical system now used in some 400 communities around the nation. Which means what, Dr. Clawson?

Dr. JEFF CLAWSON, Salt Lake City Fire Department: It means that the concept of emergency medical dispatch and dispatch screening is something that has really rapidly spread in the last four or five years. The dispatcher previous to this time had basically no medical training, maybe not even a single hour of medical training, and yet was relied upon to make very important decisions concerning who went, whether they *[audio interruption]* red light and siren in communities. And in essence, they would invent the wheel every time the phone rang in a crisis.

KOPPEL: Yeah, but in point of fact, that's really not what we're talking about in this Dallas case, is it? I mean there you had, presumably, someone who is medically qualified — a nurse who, as Chief Jones just told us, had to have undergone at least a year's training in an intensive care unit. So that's not the case there, is it? And yet we still have the capacity for enormous failure. How does one avoid that? How does one get around it?

Dr. CLAWSON: Well, I've listened to that case now, and I think it's just practically an enigma. I can't understand why it would have happened. Those people are trained. I'm aware of their program, it's been an excellent program. They follow specific protocols. Our program that has developed in Salt Lake City ran along similar evolutionary lines as the Dallas program, although we trained basic dispatchers in how to follow specific protocols.

KOPPEL: All right, forgive me for interrupting. Let me ask you what I think is really the fundamental question in this case, and that is, one would expect someone who is calling in to report that his stepmother or some close relative is close to death, to be a little bit irrational. Now, quite frankly, I think that man sounded quite rational on the phone and showed a lot more patience than I might have shown under similar circumstances. Aren't people trained to deal with folks who are semihysterical?

Dr. CLAWSON: Yes, they deal with it every day of the week. But once the patient or the caller would indicate a priority symptom such as difficulty breathing or the patient was incoherent, that would generate a maximum response in any system that I'm aware of. Why that didn't occur, I really can't explain. We have protocol systems, we have specific key questions that are asked by the dispatchers that are medically approved. It takes 30 seconds to that.

KOPPEL: All right, take 30 seconds and do it, would you?

Dr. CLAWSON: Well, for example, on that call, had the dispatcher been aware that the person had breathing trouble, would have asked is the patient conscious or able to talk, is the patient turning blue, is the patient wheezing, is there chest pain involved, did the victim choke first? A positive response to any of those questions would result in what we call a Marine Corps response — everyone goes, the ambulance, the closest fire department vehicle, and the paramedics.

KOPPEL: All right, in the few seconds we have left, give us, the consumer, the one who may be on the phone calling the fire department any one of these days — what should we know? What is the first thing we should tell those people when we call the officials and want them to help us?

Dr. CLAWSON: The first thing to do is to understand, you have to cooperate and answer a minimum number of questions. That once you do that, then the fire department will send the appropriate thing. Given that most municipalities have a number of different vehicle configurations that they can send, they need to know those specific things. A little boy that's broken his arm doesn't need a paramedic unit, but unless we asked a couple of questions we can't determine that. And yet if we send the paramedic unit to that call, they may be tied up and unable to answer a call to a cardiac arrest that might occur a few blocks from their station. That's the dilemma. This should not occur, and indeed doesn't occur. This is the first case I've heard of in over 40 million dispatches that have occurred since Salt Lake and Dallas have been doing dispatch priority screening.

KOPPEL: All right. Dr. Clawson, forgive me, and I thank you — I know we've had some technical problems throughout, but I appreciate your being so patient with us.

Dr. CLAWSON: Thank you.

KOPPEL: Tomorrow on World News Tonight with Peter Jennings, a report from correspondent Gary Shepard on the battle between Continental Airlines and the pilots union over airline safety. That's our report for tonight. I'm Ted Koppel in Washington. For all of us here at ABC News, good night.

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ATTACHMENT 4

EDITORIAL

The Ideal World

In an ideal world, there would be plenty of money to provide ambulance service to everybody who needs it. If more than one organization wanted to provide ambulance service to the same area, the choice would be made strictly on the basis of which could provide the best service.

But this isn't an ideal world, and there isn't enough money. Most of the money to provide emergency ambulance service comes from property and sales taxes levied by local governments. Elected officials control spending of those tax dollars and they decide which ambulance service will get the right to serve the people in their town, city or county.

How do elected officials decide? In a very few cases, they rely on detailed information and make a choice with the patients' needs foremost in mind. In other cases, they rely on staff recommendations or they opt for the cheapest way to get the job done. In an unknown number of cases, they solicit and accept bribes and sell their vote to the highest bidder.

EMS journalism generally has been sugar coated. In publishing this bribery story, we realize we are opening doors to dirty linen, but a sickness untreated most often will worsen.

At the very least, bribery is a crime punishable by fine, imprisonment or both. As a process for making public policy decisions, bribery is an obscene assault on the civilized structures of a free society. When bribery short-circuits decisions based on quality of medical care, untold numbers of patients become potential victims.

With regret and some embarrassment, we present a story of bribery and its aftermath in this issue of *jems* (page 24). In Alhambra, California, citizens vote for and elect fellow citizens to represent them in city government — to make important decisions affecting public health and safety. In Alhambra last year, there was an effort to short-circuit the legal process of making important decisions. Writer Danny Pollock shares the story with powerful emphasis on the human costs.

EMS journalism generally has been sugar coated. In publishing Pollock's story, we realize we are opening some doors to dirty linen. That may be the price for exposing a serious problem of unknown dimensions. A sickness untreated most often will worsen.

In the next year or two, local elected officials in hundreds of communities will be making important decisions about ambulance service. Because they will be spending tax monies to pay for or subsidize ambulance service, they'll feel they have an exclusive right to select the provider. In some communities, some providers will be tempted to buy the votes of elected officials. Some elected officials will be tempted to sell their votes for a price (bribery).

The tragic story of Alhambra Mayor Mike Rubino should be required reading for every elected official. But in publishing his story, we are like the minister who preaches to the choir. The people who need to read it aren't likely to read this magazine.

We must never let ambulance service contract decisions sink to the level of building maintenance, vending machine or trash collection contracts. Ambulance service contracts must be awarded solely on the basis of quality, reliability and cost. The provider who buys votes to get a contract injures the future of everybody in our field.

Will your community make a decision about ambulance service in the near future? Is there a possibility that one or more of your local elected officials may sell their vote to the bidder with the biggest wad of under-the-table money? Is it possible that the fate of some emergency patients may be affected by the crime of bribery?

If so, we urge you to photocopy Danny Pollock's article. Make sure it gets into the hands of those who may be tempted. Bribery has no place in public policy decisions. The sad story of Mike Rubino and his city might convince others to resist temptation. ☐

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SPECIAL REPORT

Influence Peddling Backfires

by Danny Pollock

Danny Pollock is a Los Angeles based journalist specializing in crime and politics.

In Alhambra, California, like most midsized, middle-class U.S. cities, ambulance service is big business. It costs $90 each time a city-operated ambulance goes to someone's aid; $14 extra for oxygen; $14 extra for night calls; $14 more if the call is run with lights and siren and $6 per mile for the ride. In 1982, the city and its users paid $372,000 for the service. City hall covered $222,000, users paid the rest.

In 1983, however, the city found itself facing a $4 million budget deficit. The city council studied ways to cut spending. One way was to contract for ambulance service. Unfortunately, when two people tried to capitalize on that possibility, it became an unhealthy situation.

One of those persons was then-Mayor Mike Rubino. The other was Robert Risher, a Los Angeles County ambulance operator and former reserve police officer. With Rubino as mayor, they consolidated their efforts and sought a contract for Risher, but in the end neither got what he wanted.

For his part, Rubino was arrested and charged with taking a $1,000 bride from Risher. After pleading guilty, the mayor was stripped of his office and his right to hold future public office. On February 27th, he was sentenced to three years probation and 1,000 hours unpaid public service as an alternative to a jail term.

Risher's efforts have been put on hold until other city options are studied. He believes the city may be "afraid to touch" his offer because of the controversy caused by the arrest and his part in a four-month investigation of Rubino by the district attorney. Meanwhile, says Risher, potential users of his more comprehensive (paramedic level) service suffer.

Perhaps there is only one positive side to this twisted tale. An important point has been made: There is danger in mixing politics and high-stakes health care.

Both Risher and Rubino claim their motives were modest when they met in February 1983. Risher hoped to drum up a little new business in Alhambra by giving away telephone stickers carrying his phone number. At the time he says, he was not interested in a city contract. That would soon change.

Rubino says he simply wanted a job. His $50 a month mayor's salary and the few hundred he earned from a pizza business co-owned with his brother weren't making ends meet. He had experience promoting another area ambulance firm and hoped Risher might have a spot for him in the company.

It was February 9th when Risher called City Hall for permission to pass out his stickers. The city manager war out. Risher was referred to then-Mayor Rubino.

Later, at Rubino's preliminary hearing, Risher testified that the mayor suggested something more profitable during their conversation. He alleged that Rubino offered to use his political influence to secure a city contract if he was paid $1,000 a month to do public relations work for the ambulance company.

Despite his guilty plea, Rubino tells it differently. There was talk of a contract and the part Rubino might play in its being awarded. But there was no demand for a job, he insists.

A few days later, Risher took the matter to Alhambra's police chief who quickly passed it on to the district attorney. Risher met with special investigators and agreed to be "wired" for sound during future meetings with Rubino. Tape recordings of those meetings later would be promoted as the most damaging evidence against the mayor. But the guilty plea kept the case from going to trial and the tapes were never made public. Thus, the most compelling record of what happened was provided by Risher at the September 12th preliminary hearing. From that testimony, it's evident that things did not go as one might expect.

Risher testified that on February 23rd Rubino said that the $1,000 monthly salary might be a conflict of

Mike Rubino breaks down during sentencing and is consoled by his attorney, Stephen DeSales. The judge called Rubino "a desperate man. . . to weak to resist temptation," in sentencing him to log 1,000 hours of unpaid public service. The judge also said that it was not unreasonable to assume Rubino's November 23rd guilty plea was partially responsible for the heart attack death of his mother two days later.

interest and he didn't know how to get around that. Surprisingly, in search of an answer, the mayor visited City Attorney Ed Dilkes. Dilkes confirmed there was a meeting around that time.

To resolve the conflict, Risher testified, "Rubino said he would do the work and another person would get paid." The other person was Frank Pallonetti, an "old friend" of Rubino. Pallonetti says he worked out an arrangement to do public relations work for Risher, but added that his only PR experience came from owning taverns in New Jersey.

"Risher said he would pay me $1,000 a month," Pallonetti said. "I was gonna visit places and try to get business. I don't know where, or what I was gonna do exactly. Mike (Rubino) was gonna go with me for two weeks and show me." Says Rubino: "After I realized I couldn't take the job, I passed it along to my friend." Risher, however, claims Rubino was simply trying to find another person to cash the check; he was not trying to get rid of the job.

Risher says after the mayor missed one of the next meetings, he made it clear that if appointments couldn't be kept, the arrangement might be scrapped. Rubino protested, insisting he "needed the money so bad he could taste it," Risher testified.

That is one thing even Rubino admits. His 85-year-old mother, victim of a serious stroke, required expensive medication and therapy. He also hoped to hire a speech therapist so she might speak again before she died. His own health also was a concern. He'd had double bypass heart surgery and required medication himself. Caring for his mother and keeping the pace of a mayor was taking its toll on his heart as well as his finances.

At one of the next meetings, Risher says he told Rubino that he would be put on the payroll "if things could be worked out."

That stood as the last word for some time. Rubino was tied up with lengthy budget sessions aimed at the $4 million deficit. Spending cuts were discussed at those meetings. The question of ambulance service was raised and, on May 9th, Risher was given a chance to make a pitch for a contract to the full city council.

He was prepared to offer more comprehensive service than the city provided. There would be no charge to City Hall. Fees would be paid only by users or their insurance companies at rates controlled by county ordinance. Rubino was supportive throughout the presentation.

But the rest of the council was not easily sold. Members questioned whether the city would really get something for nothing and directed staff to further study this and other alternatives. Risher did not give up. He followed up with a detailed written proposal on May 20th — seven days before making his first and last $1,000 payment for public relations.

Risher says he was told to bring a check with only the $1,000 amount filled in to the Mayor's house on May 27th. As he had been at every meeting with Rubino since the investigation started in late February, Risher was wired to record the conversation. But this time he was accompanied by a pack of investigators equipped to record every sound inside and the scene outside the mayor's house.

"He alleged that Rubino offered to use his political influence to secure the city ambulance contract."

Inside the house, Risher met Pallonetti for the first time. While Rubino talked on the phone, their arrangement was worked out. Checks were to be made out to Pallonetti, who could cash them and give the money to Rubino, Risher testified.

Pallonetti says he didn't expect a check that day — that he would work a month and then get paid. "I thought I wouldn't get my first paycheck until. . .June 27th," he said. Risher disputes that claim, however, and says Pallonetti was at the mayor's house with the intention of opening a bank account for deposit of the check that day.

Risher had brought a check and left it in the trunk of his parked car. It wasn't long before he and the mayor went out to get it. On their way to the car, Risher testified, Rubino once again assured him that the ambulance service contract was in the bag.

As cameras and tape recorders rolled, Risher opened his trunk and removed the check. When it was in the mayor's hand, investigators moved in and made the arrest. Hours later it was reported on every Los Angeles newscast. One station broadcast Rubino's arrival at County Jail.

Risher says Rubino expected a check that day, but Rubino's attorney suggested otherwise. The check (which Risher had placed in an envelope) was not meant for Rubino, the attorney argued. It "was literally thrown" at Rubino to give to Pallonetti, he claimed. And the arrest was simply the climax of a frame, planned and executed for political reasons, charged attorney Stephen DeSales. He refused, however, to name names or disclose other details.

A political seige of Rubino began at the first city council meeting after his arrest. Hundreds of people turned out for what promised to be an evening of fireworks and dog fights. They heard one council member demand the mayor's resignation. Two others urged him to take a leave of absence until the question of his guilt was resolved.

Rubino was unshaken. He sat quietly and listened resolutely as dozens of friends and foes stepped to the public comment podium and argued the merits of the mayor and his case.

After the last one had spoken, Rubino took his turn. "I stand before you. . .a man who has been convicted by the papers, the radio, the television and the people. . .you people have tried me, convicted me and buried me. . .I'd like to have my day in court. "Only the guilty resign, and I'm not guilty," he said then, refusing to give up the office that made him an important though unemployed man.

His enemies, however, refused to wait for the mayor's day in court. Walking door-to-door, they collected more than 5,000 signatures and forced the first recall in the city's 80-year history to settle the question.

Two weeks before the scheduled recall election, the mayor's trial began. But the cost of his defense and the thought of losing the family home to pay for it had become distressing. And, in the face of his own failing health and the ever-escalating political infighting, his resolve had steadily crumbled.

On November 23rd Mike Rubino changed his plea to guilty.

Robert Risher has advised the city of Alhambra that his contract offer is still valid and that the city should feel free to act on it at its discretion. However, the city is delaying any decision pending a report on possible consolidation of the city's fire department with Los Angeles County's. □

The CHAIRMAN. Next Mr. Stewart C. Eggert, legal counsel for the Hillsborough County Aviation Authority.

Mr. EGGERT. Mr. Chairman, I am Stewart C. Eggert, legal counsel for the Hillsborough County, FL, Aviation Authority, the operator of Tampa International Airport. I am also past chairman of the Legal Committee of the Airport Operators Council International, AOCI.

The Airport Operators Council International is the association of the governmental bodies that own and operate the principal airports served by the scheduled air carriers in the United States, as well as in many countries abroad. Our U.S. member airports annually enplane more than 90 percent of the domestic and virtually all of the U.S. international scheduled airline passenger and cargo traffic. In addition, our local government members operate many reliever and other general aviation facilities that supplement the larger airports in their communities and regions. A listing of our U.S. members is attached, attachment A.

We are pleased, on behalf of our U.S. members, to have the opportunity to comment on S. 1578, the Local Government Antitrust Act of 1984, and to propose an alternative legislative approach as to the form of immunity needed by local governments from the Federal antitrust laws.

Public airport owners and operators through AOCI are convinced that congressional legislation to prevent the ongoing and expected discrepancies in the case law as to the applicability of the Sherman and Clayton Acts to local governments is needed and needed promptly.

Since *City of Lafayette* v. *Louisiana Power & Light Co.,* 435 U.S. 389 (1978) was decided and, more particularly, since *Boulder,* the public entities owning and operating airline served airports have been burdened with a large increase in antitrust claims and lawsuits, mostly from unsuccessful applicants for limited airport concession space. According to statistics published by the National Institute of Municipal Law Officers, NIMLO, public airports and their concessions account for 15 percent of all post-Lafayette antitrust actions against municipal governments, a second place finish right behind municipal cable television, 16 percent.

Under these Supreme Court rulings, public airports' freedom from antitrust challenge would be limited to circumstances where a "clearly articulated and affirmatively expressed state" policy "to displace competition" could be found by a Federal district court.

Since Boulder, public airports with scheduled airline service have been considered easy prey to the mischief of plaintiff antitrust claims for a variety of reasons. The public airport often is a natural and practical monopoly, owned and operated by a municipality, county or special purpose district—airport authority or multimodal port authority—that historically had been protected from antitrust scrutiny under the *Parker* v. *Brown* (317 U.S. 341 (1943)) doctrine of State action immunity.

Mr. Chairman, because other Federal laws already assure that competition will not be impaired at public airports, without reservation we urge this committee to enact legislation that gives municipal and other local governmental activities, whether they be general or special purpose, the same protection now allowed the

States under the *Parker* State action immunity doctrine and to free public airports from the unnecessary fear or damages, even treble damages, being awarded against them under section 4 of the Sherman Act.

Our paper refers to several pieces of existing Federal aviation law that the foster procompetitive and nondiscriminatory practices by airports. In our view, then direct applicability of the Federal antitrust laws to local governmental airport sponsors adds little benefit to aviation's own Federal laws and will create serious disadvantages.

For example, nonexclusionary access by all airlines, commuter carriers and general aviation, private flyers, to the airport air side—runways, taxiways, ramps and hangars—has been agreed to by grantee airports as a Federal aid condition that has been mandated by section 308(a) of the Federal Aviation Act of 1958 (19 U.S.C. 1354(a)). That provision states, in pertinent part, that "there shall be no exclusive right for the use of any landing * * * facility upon which Federal funds have been expended."

The Attorney General of the United States has interpreted this language, which has long been part of the contract signed by airport sponsors for Federal grant-in-aid funds, to prohibit the exclusion of any class of airport user or of users within any class of airport user. The Attorney General held (40 Op. Attorney General, 71 (1941)), that this interpretation:

> Is confirmed by the legislative history which shows that the purpose of the provision is to prohibit monopolies and combinations in restraint of trade or commerce and to promote and encourage competition in civil aeronautics.

A similar guarantee is found in the Airport and Airway Improvement Act of 1982 where it says the airport will be available for public use on fair and reasonable terms without unjust discrimination, and section 502 of that same act talks about the necessity of fostering competition, preventing unfair methods of competition, and maintaining essential air transportation and preventing unjustified discriminatory practices.

The Chief Counsel of the Federal Aviation Administration personally has already questioned whether the antitrust laws need apply to public airports, and a complete résumé of what he said in Atlanta recently on this subject is included in the paper we submitted to you.

The FAA enforcement process that we are subject to operates normally through injunctive relief. This accelerates the resolution of any underlying conflict and would minimize any blackmail value that any antitrust allegation may bring with it.

Finally, Mr. Chairman, S. 1578 as introduced would grant immunity for all State authorized activities by general purpose local governments but, apparently, would leave subject to the Federal antitrust laws proprietary activities of all local governments and all actions of special purpose units of government.

Mr. Chairman, from the viewpoint of local governmental airport sponsorship and operators, these are distinctions without any difference and, to avoid a future quagmire and unequal treatments, we urge these be eliminated from whatever you report to the Senate.

Similarly, the form of governmental structure, whether the airport is a self-supporting department of a city or whether part of the county or has been spun off as an autonomous airport authority covering a single or a multijurisdictional geographical area, historically it has been unimportant to the airport's daily operations and relationships with tenants and other airport users.

In other words, Mr. Chairman, a rose is a rose is a rose is a rose. A public officer is a public officer whether he is elected or is a public officer who has been appointed.

Interestingly, 29 of the Nation's largest airports—and I have put this on the attachment, Mr. Chairman—have an authority structure that would apparently preclude them from antitrust protection under S. 1578 as introduced. We can find no justification for this.

For example, we just heard from the mayor of Charleston, and I echo his comments on including airport authorities into the antitrust protection. As an example of this, Charleston, SC, has an authority type of government and would be subject to the strictures of the antitrust laws; whereas, its neighbor and competitor, Savannah, GA, is a city operation and would not be subject to the antitrust laws.

For all of these reasons, Mr. Chairman, the Airport Operators Council International urges your Committee's consideration of an alternate form of local governmental immunity legislation, which we have attached to our paper, that would accomplish the objectives set out in our testimony, and I would like to submit that paper in its entirety at this time, if I might.

The CHAIRMAN. How long is that statement, Mr. Egger?

Mr. EGGERT. It has already been submitted. It was submitted earlier.

The CHAIRMAN. If it is a longer paper, we will put it in the files of the Committee. If it is not so long——

Mr. EGGERT. It is only about 10 or 11 pages, as I recall.

The CHAIRMAN. We will put it in the record.

[The following was received for the record:]

AIRPORT OPERATORS COUNCIL INTERNATIONAL

Testimony

of the

AIRPORT OPERATORS COUNCIL INTERNATIONAL

on

S. 1578,

LOCAL GOVERNMENT ANTITRUST ACT OF 1984

and

Other Proposals to Protect Local Governmental Units

From Application of the Federal Antitrust Laws

Before the

Committee on the Judiciary

United States Senate

Washington, D.C.

April 23, 1984

Mr. Chairman and Members of the Committee, I am Stewart C. Eggert, Legal Counsel for the Hillsborough County (Florida) Aviation Authority, the operator of Tampa International Airport, and Past Chairman of the Legal Committee of the Airport Operators Council International (AOCI). I am accompanied by Jack Corbett, AOCI Vice President - Federal Affairs, who monitors legal and legislative issues for the association.

The Airport Operators Council International is the association of the governmental bodies that own and operate the principal airports served by the scheduled air carriers in the United States, as well as in many countries abroad. Our U.S. Member airports annually enplane more than 90 percent of the domestic and virtually all of the U.S. international scheduled airline passenger and cargo traffic. In addition, our local government members operate many reliever and other general aviation facilities that supplement the larger airports in their communities and regions. A listing of our U.S. Members is attached (Attachment A).

We are pleased, on behalf of our U.S. members, to have the opportunity to comment on S. 1578, the Local Government Antitrust Act of 1984, and to propose an alternative legislative approach as to the form of immunity needed by local governments from the Federal antitrust laws.

Public airport owners and operators through AOCI are convinced that Congressional legislation to prevent the ongoing and expected discrepancies in the case law as to the applicability of the Sherman and Clayton Acts to local governments is needed and needed promptly. The decision of the United States Supreme Court in Community Communications Co., Inc., v. City of Boulder, 455 U.S. 40 (1982), established that, until Congress acts, cities and other local governmental entities are subject to the Federal antitrust laws whenever local action — by municipal airport authorities or others — would have an impact on competition, irrespective of any countervailing benefits to the public that would flow from the local government's action.

Since City of Lafayette v. Louisiana Power and Light Co., 435 U.S. 389 (1978), was decided and, more particularly since Boulder, the public entities owning and operating airline-served airports have been burdened with a large increase in antitrust claims and lawsuits, mostly from unsuccessful applicants for limited airport concession space. According to statistics published by the National Institute of Municipal Law Officers (NIMLO), public airports and their concessions account for 15% of all post-Lafayette antitrust actions against municipal governments, a second place finish right behind municipal cable television (16%).

Under these Supreme Court rulings, public airports' freedom from antitrust challenge would be limited to circumstances where a "clearly articulated and affirmatively expressed state" policy "to displace competition" could be found by a Federal district court.

Since Boulder, public airports with scheduled airline service have been considered easy prey to the mischief of plaintiff antitrust claims for a variety of reasons. The public airport often is a natural and practical monopoly, owned and operated by a municipality, county or special purpose district (airport authority or multi-modal port authority) that historically had been protected from antitrust scrutiny under the Parker v. Brown (317 U.S. 341 (1943) doctrine of state action immunity.

Further, since the Airline Deregulation Act was passed by Congress in 1978 and more particularly since the nation's economic recession has abated, the demand for airside capacity (by airlines, commuter carriers and general aviation), has simply exceeded supply at major U.S. jetports. This trend is expected to spread to many other large, commercial airports during this decade.

Similarly, on the terminal side of the airport, the desire of private entrepreneurs for terminal building concession space in which to sell goods or services or from which to rent cars, etc., seems inexhaustible although available space is highly limited. Lastly, on-and-off airport bus and limousine services, taxicab operations and hotel courtesy vans likely would generate airport roadway gridlock during peak hours and unacceptably poor off-hour minimum service levels to airport users if their operations were not minimally restricted and regulated by airport authorities.

Finally, with the $9.5 million antitrust judgment this past January against two local governments in Unity Ventures v. County of Lake (N.D. Ill 81C2754), trebled to $28.5 million under Section 4 of the Sherman Act, local governmental airport sponsors are convinced that Federal legislation is needed now to forestall an increasing number of antitrust claims being lodged against these financially fragile political subdivisions of state government.

Worse, local officials may increasingly become unwilling to make tough regulatory decisions in the public interest to protect airport users' safety or welfare for fear of somehow impairing competition and becoming embroiled in expensive and extended litigation that could seriously endanger the public fisc, in addition to personal liability of the public officers.

- AOCI Recommendations to Congress

Mr. Chairman, because other Federal laws already assure that competition will not be impaired at public airports, without reservation we urge this Committee to enact legislation that gives municipal and other local governmental activities, whether they be general or special purpose, the same protection now allowed the states under the Parker state action immunity doctrine[1/] and to free public airports from the unnecessary fear of damages, even treble damages, being awarded against them under Section 4 of the Sherman Act.

1. Federal Aviation Law Mandates Competition and Open Access at Airports

Some 2700 U.S. publicly-owned airports, including all airports currently receiving scheduled airline service, have received Federal grant-in-aid funds for airport planning and development under the Airport and Airway Development Act of 1970 (49 U.S.C. 1701 et seq.) and/or the Airport and Airway Improvement Act of 1982 (49 U.S.C. 2201 et seq., Title V of the Tax Equity and Fiscal Responsibility Act of 1982, Public Law 97-248) as administered by the U.S. Department of Transportation (DOT).

In so doing, those primarily municipal airport sponsors have commited themselves to observing for twenty (20) years from the date of their last grant agreements all the Federal Government's applicable statutory requirements. These include many pro-competitive policies such as prohibiting exclusive aeronautical rights on airports, requiring airports to adopt non-discriminatory fees and charges for all airport users, and furnishing airport-provided services on a fair, equal and not unjustly discriminatory basis to all users.

In other words, airport sponsoring governments, in contracting with the DOT's Federal Aviation Administration (FAA) to assure that the pro-competitive mandates of Federal aviation law are observed, are already committed to helping achieve the objectives of the Federal antitrust laws. In our view, then, direct applicability of the Federal antitrust laws to local governmental airport sponsors adds little of benefit to aviation's own Federal laws and will create serious disadvantages.

[1/] Hart, Christopher A. "State Action Immunity for Airport Operators"; 12 Transportation Law Journal 1 (1981), suggests in a pre-Boulder discussion that a "preemption" analysis is more appropriate than any consideration of "immunity" or exemption from Federal antitrust law.

- Open Access for Airlines

For example, non-exclusionary access by all airlines, commuter carriers and general aviation (private flyers) to the airport airside (runways, taxiways, ramps and hangars) has been agreed to by grantee airports as a Federal aid condition that has been mandated by Section 308(a) of the Federal Aviation Act of 1958 (19 U.S.C. 1354(a)). That provision states in pertinent part that "there shall be no exclusive right for the use of any landing ... facility upon which Federal funds have been expended."

The Attorney General of the United States has interpreted this language, which has long been part of the contract signed by airport sponsors for Federal grant-in-aid funds, to prohibit the exclusion of any class of airport user or of users within any class of airport user. The Attorney General held (40 Op. Att'y Gen. 71 (1941)) that this interpretation:

> is confirmed by the legislative history which shows that the purpose of the provision is to prohibit monopolies and combinations in restraint of trade or commerce and to promote and encourage competition in civil aeronautics.

FAA in its current Sponsor Assurances prohibits exclusive rights for the use of the airport by any person "providing, or intending to provide" aeronautical services to the public. According to FAA, this ensures "all interested parties ... a fair and reasonable opportunity to qualify for consideration or otherwise compete for available facilities."[2/]

2. Airports May Not Unjustly Discriminate

In addition, Section 511 of the Airport and Airway Improvement Act of 1982 (49 U.S.C. 2210(a)(i) and (b)) continues past law in requiring that a municipal airport sponsor to be eligible for Federal development grants must satisfy the Secretary of Transportation that the airport "will be available for public use on fair and

---

[2/] FAA policy statement, Prohibition of Exclusive Rights on Airports Receiving Federal Funds, 27 F.R. 7054, 7055 (July 25, 1962).

reasonable terms and without unjust discrimination." And, where an airport provides services at a customer level, it must provide services or goods on a fair, equal and not unjustly discriminatory basis to all users.

3. FAA Must Use Airport Grants to Foster Competition

Finally, in implementing current and future Federal airport grant programs, the FAA must adhere to explicit Federal aviation policy favoring competition:

> All airport and airway programs should be administered in a manner consistent with the provisions of Sections 102 and 103 of the Federal Aviation Act of 1958, with due regard for the goals expressed therein of fostering competition, preventing unfair methods of competition in air transportation, maintaining essential air transportation, and preventing unjustified discriminatory practices.
>
> Sec. 502(a)(5) of the
> Airport and Airway Improvement Act of 1982
> (49 U.S.C. 2201(a)(5))

Citing these statutory provisions, the current Chief Counsel of the Federal Aviation Administration personally has already questioned whether the antitrust laws need apply to public airports:

> Considering the comprehensive scope of other federally enforceable laws that are specific as to airports and that are intended to prevent discrimination, increase competition, and assure access to airport facilities on a systematic, nation-wide level, it may be reasonable, at some future point, to conclude that municipal airport operators that are subject to the numerous conditions, terms, and assurances of FAA grant agreements (under the 1970 or 1982 Acts) should not, in their airport management functions, be subject to the same antitrust principles that apply to corporate competitors, but rather, in the discharge of their obligations as federally-funded public airport sponsors, should be subject only to Federal grant law and related concepts designed to ensure the quality of their public service, such as the "public utility," essential facility" or "common carrier" doctrines. 3/

3/ Murdock, John E. III, Chief Counsel, and Danforth, Richard W., Manager, Airports and Environmental Law Branch, U.S. Federal Aviation Administration, in personal views, "Deregulation, Antitrust and Proprietor's Rights: A 'System -View' of the Airport Access Question," to American Bar Association's Airport Law Committee, Atlanta, Georgia, pp. 19-20 (July 30, 1983).

Moreover, the FAA statutory scheme offers subsidiary benefits to local governments that are not generally available under the Federal antitrust laws. First, the FAA enforcement process operates normally through injunctive relief and this much accelerates resolution of the underlying conflict. Under the antitrust law approach, the airport sponsoring government would be powerless to act on the subject matter underlying the controversy until a likely multi-year lawsuit is finally resolved. That time differential is critical.

In addition, the injunctive relief approach through its relatively speedy resolution minimizes any "blackmail" value that an antitrust allegation may bring with it.

Lastly, the FAA injunctive relief approach would eliminate the dark shadow of possible trebled damages accompanying a judicial finding of antitrust liability against the local government and its officials.

2. Special Purpose Airport Authorities and Proprietary Activities Equally Deserve Immunity

S. 1578 as introduced would grant immunity for all state-authorized governmental activities by general purpose local governments but apparently would leave subject to the Federal antitrust laws proprietary activities of all local governments and all actions of special purpose units of government. Where the activities are to be immunized, the actions of those local officials themselves seemingly would also be protected from individual liability by S. 1578.

Mr. Chairman, from the viewpoint of local governmental airport sponsorship and operation, these are distinctions without differences and, to avoid a future "quagmire," we urge that these distinctions be eliminated from whatever legislation your Committee finally reports to the Senate. While public airport ownership and operation is a traditional activity of municipal governments, state enabling laws and court decisions classify some airport operations as governmental in nature and others as proprietary without any clear, distinguishing reasoning.

Similarly, the form of governmental structure — whether the airport is a self-supporting department of a city or has been spun off as an autonomous airport authority covering a single or a multi-jurisdictional geographical area — historically has been unimportant to the airport's daily operations and relationships with tenants and other airport users. For example, some 29 of the nation's largest airports (Attachment B) have an authority structure that would apparently preclude them from antitrust protection under S. 1578 as introduced. We can find no justification for removing half of the nation's largest airports, those enplaning one of every three U.S. airline passengers, from the strictures of Federal antitrust law and leaving the others to be subject to its provisions or, worse, to court interpretations of its provisions.

Some of the provisions of S. 1578 are vague and uncertain and will leave much for court interpretation. The effect may be crippling litigation with a chilling effect or curtailing valid governmental activities by local governmental bodies.

For all the above reasons, Mr. Chairman, the Airport Operators Council International urges your Committee's consideration of an alternate form of local governmental immunity legislation (Attachment C) that would accomplish the objectives set out in our testimony.

Thank you. We would be pleased to attempt to respond to your questions.

Attachment A

AIRPORT OPERATORS COUNCIL INTERNATIONAL ROSTER OF MEMBERS

The Airport Operators Council International (AOCI) is the association of the primarily local governments that own and operate the principal airports served by the scheduled airlines in the United States and around the world. AOCI member airports annually enplane more than 90% of the total domestic and virtually all of the U.S. international scheduled airline passenger and cargo traffic. Worldwide, AOCI international member airports enplane two-thirds of all airline passengers on six continents. AOCI represents only its United States membership in testimony before Congress and in appearances before Executive Branch agencies.

UNITED STATES MEMBERS

ALABAMA:	Birmingham - Department of Aviation
ALASKA:	*Alaska - Department of Transportation & Public Facilities *Juneau - City and Borough of
AMERICAN SAMOA:	*Pago Pago - Government of
ARIZONA:	*Phoenix - Aviation Department *Tuscon - Airport Authority
CALIFORNIA:	Bakersfield - Kern County Department of Airports Burbank - Burbank/Glendale/Pasadena Airport Authority Fresno - City of *Los Angeles - Department of Airports Oakland - Board of Port Commissioners Palm Springs - City of Riverside - City of Sacramento - County of *San Diego - Unified Port District *San Francisco - City and County of San Jose - City of Santa Ana - Orange County Airport Santa Barbara - Municipal Airport Stockton - San Joaquin County
COLORADO:	Colorado Springs - City of Durango-La Plata - County Airport *Denver - City and County of Pueblo - Memorial Airport
CONNECTICUT:	*Windsor Locks - Connecticut Department of Transportation
DISTRICT OF COLUMBIA:	*Washington - Metropolitan Washington Airports
FLORIDA:	Daytona Beach - Regional Airport *Fort Lauderdale - Board of Broward County Commissioners Fort Myers - Lee County Airport Gainesville - Regional Airport *Jacksonville - Port Authority Melbourne - Airport Authority *Miami - Dade County Aviation Department Naples - Municipal Airport *Orlando - Greater Orlando Aviation Authority *Palm Beach - Board of County Commissioners Pensacola - City of *St. Petersburg-Clearwater - International Airport Sarasota-Manatee - Airport Authority *Tampa - Hillsborough County Aviation Authority
GEORGIA:	Albany - Albany-Dougherty County Airport *Atlanta - Department of Aviation Savannah - Airport Commission
GUAM:	*Guam - Government of
HAWAII:	*Honolulu - Department of Transportation

* U.S. International Airport

ILLINOIS:	*Chicago - Department of Aviation Moline - Rock Island County Metropolitan Airport Authority Peoria - Greater Peoria Airport Authority Rockford - Greater Rockford Airport Authority Springfield - Airport Authority
INDIANA:	Fort Wayne - Board of Aviation Commissioners *Indianapolis - Airport Authority South Bend - St. Joseph County Airport Authority
IOWA:	Cedar Rapids Des Moines - Department of Aviation Mason City - Municipal Airport Commission
KANSAS:	Topeka - Metropolitan Airport Authority Wichita - Airport Authority
KENTUCKY:	Lexington - Lexington-Fayette Urban County Airport Board Louisville - Regional Airport Authority of Louisville and Jefferson County Paducah - Airport Corporation
LOUISIANA:	Baton Rouge - Greater Baton Rouge Airport District Lafayette - Airport Commission *New Orleans - Aviation Board Shreveport - Airport Authority
MAINE:	*Bangor - City of
MARIANA ISLANDS:	*Saipan - Bureau of Transportation *Saipan - Mariana Islands Airport Authority
MARYLAND:	*Maryland - State Aviation Administration
MASSACHUSETTS:	*Boston - Massachusetts Port Authority Hyannis - Barnstable Municipal Airport
MICHIGAN:	*Detroit - Board of Wayne County Road Commissioners *Flint - City of Freeland - Tri-City Airport Commission *Grand Rapids - Kent County Aeronautics Board Jackson - County Airport-Reynolds Field Kalamazoo - Municipal Airport *Lansing - Capital Region Airport Authority *Muskegon - County Airport
MINNESOTA:	*Minneapolis-St. Paul - Metropolitan Airports Commission
MISSISSIPPI:	*Gulfport - Gulfport-Biloxi Regional Airport Authority Jackson - Municipal Airport Authority Laurel/Hattiesburg - Pine Belt Regional Airport Authority
MISSOURI:	Columbia - City of *Kansas City - Aviation Department *St. Louis - Airport Authority St. Louis County - Spirit of St. Louis Airport Springfield - Municipal Airport Board
MONTANA:	*Great Falls - International Airport Missoula - County Airport
NEBRASKA:	Lincoln - Airport Authority Norfolk - Karl Stephaan Memorial Airport North Platte - Airport Authority Omaha - Airport Authority
NEVADA:	*Las Vegas - Clark County Department of Aviation *Reno - Airport Authority of Washoe County
NEW HAMPSHIRE:	Manchester - Airport Authority
NEW JERSEY:	Trenton - Mercer County Airport Atlantic City - Airport Utility
NEW MEXICO:	*Albuquerque - City of

NEW YORK:	Binghamton - Broome County Airport *Buffalo - Niagara Frontier Transportation Authority *New York - Metropolitan Airports Authority *New York - Port Authority of New York and New Jersey *Syracuse - Department of Aviation White Plains - Westchester County Airport
NORTH CAROLINA:	Asheville - Regional Airport Authority Charlotte - City of Greensboro-High Point - Airport Authority Raleigh - Raleigh-Durham Airport Authority Winston-Salem - Airport Commisssion of Forsyth County
OHIO:	Akron-Canton - Regional Airport *Cincinnati - Kenton County Airport Board *Cleveland - City of *Columbus - Port Columbus International Airport *Dayton - Department of Aviation Toledo-Lucas County - Port Authority Youngstown - City of
OKLAHOMA:	Oklahoma City - Airport Trust Tulsa - Airport Authority
OREGON:	*Portland - Port of
PENNSYLVANIA:	Lehigh-Northampton - Airport Authority *Middletown - Pennsylvania/DOT Bureau of Aviation *Philadelphia - Department of Commerce *Pittsburgh - Greater Pittsburgh International Airport
PUERTO RICO:	*San Juan - Puerto Rico Ports Authority
RHODE ISLAND:	State of Rhode Island - Division of Airports
SOUTH CAROLINA:	*Charleston - County Aviation Authority Columbia - Metropolitan Airport Greenville-Spartanburg - Airport Commission
TENNESSEE:	Chattanooga - Municipal Airport Knoxville - Metropolitan Airport Authority *Memphis-Shelby County - Airport Authority Nashville - Metropolitan Airport Authority
TEXAS:	Austin - City of *Brownsville - City of *Dallas - Department of Aviation *Dallas/Fort Worth - Regional Airport Board *El Paso - City of *Harlingen - Vallley International Airport *Houston - City of *San Antonio - Department of Aviation
UTAH:	*Salt Lake City - Airport Authority
VERMONT:	*Burlington - Airport Commission
VIRGINIA:	*Newport News - Peninsula Airport Commission *Norfolk - Port and Industrial Authority Richmond - Capital Region Airport Commission
VIRGIN ISLANDS:	*St. Thomas - Virgin Islands Port Authority
WASHINGTON:	*Seattle - Port of *Seattle - King County Airport (Boeing Field) *Spokane - Airport Board
WISCONSIN:	Janesville - Rock County Airport La Crosse - Municipal Airport Madison - Dane County Regional Airport *Milwaukee County - Department of Public Works Oshkosh - Wittman Field Airport Rhinelander/Oneida - County Airport
WYOMING:	Casper - Natrona County International Airport Cheyenne - Airport Authority Rock Springs - Sweetwater County Airport Authority

Attachment B

LARGEST UNITED STATES PUBLICLY-OWNED AIRPORTS WITH AIRPORT OR PORT AUTHORITY STRUCTURE THAT RECEIVE SCHEDULED AIRLINE SERVICE

AIRPORT RANKING	AIRPORT AND STATE	AUTHORITY OWNER	NO. OF CY'82 PASSENGER ENPLANEMENTS
4 9 15	Kennedy, New York La Guardia New York Newark, New Jersey	Port Authority of New York & New Jersey	27,542,611
5	Dallas/Ft. Worth, Texas	Dallas/Ft. Worth Regional Airport Board	12,401,626
10	Boston-Logan Intl., Massachusetts	Massachusetts Port Authority	7,934,881
14	Lambert-St. Louis Intl., Missouri	St. Louis Airport Authority	5,962,718
16	Minneapolis/St. Paul Intl., Minnesota	Minneapolis/St. Paul Metropolitan Airports Commission	5,337,845
18	Sea-Tac International, Washington	Port of Seattle Commission	5,012,429
23	Tampa International, Florida	Hillsborough County Aviation Authority	3,861,509
24	Orlando International, Florida	Greater Orlando Aviation Authority	3,383,495
29	San Diego International, California	San Diego Unified Port District	2,818,374
30	Salt Lake City International, Utah	Salt Lake City Airport Authority	2,703,003
34	Puerto Rico International, Puerto Rico	Puerto Rico Ports Authority	2,503,578

AOCI
4/84
From FAA Statistics

(OVER)

AIRPORT RANKING	AIRPORT AND STATE	AUTHORITY OWNER	NO. OF CY'82 PASSENGER ENPLANEMENTS
35	Memphis International, Tennessee	Memphis-Shelby County Airport Authority	2,290,930
37	Portland International, Oregon	Port of Portland	1,928,054
41	Greater Buffalo International, New York	Niagara Frontier Transportation Authority	1,640,352
45	Metro. Oakland International Airport, California	Port of Oakland Board of Port Commissioners	1,454,381
46	Indianapolis International Airport, Indiana	Indianapolis Airport Authority	1,383,011
50	Reno Cannon International, Nevada	Airport Authority of Washoe County	1,281,393
51	Tulsa International, Oklahoma	Tulsa Airport Authority	1,274,199
55	Burbank Airport, California	Burbank/Glendale/Pasadena Airport Authority	1,228 [illegible]
58	Norfolk International Virginia	Norfolk Port and Industrial Authority	1,196,286
59	Metropolitan Nashville, Tennessee	Metropolitan Nashville Airport Authority	1,153,019
61	Jacksonville International Airport, Florida	Jacksonville Port Authority	1,008,891
65	Raleigh-Durham, North Carolina	Raleigh-Durham Airport	941,005
66	Standiford Field, Kentucky	Regional Airport Authority of Louisville & Jefferson County	922,009
67	Tucson International, Arizona	Tucson Airport Authority	900,547
70	Eppley Airfield, Nebraska	Omaha Airport Authority	848,[illegible]7
90	Charleston International Airport, South Carolina	Charleston County Aviation Authority	417,167

Attachment C

4/24/84

DRAFT

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1. The Federal Antitrust laws shall not apply to a unit of government, and its conduct shall not be in violation of the Federal Antitrust laws, if the unit of government is acting in a subject matter area wherein it is authorized by law to act.

Section 2. For purposes of section 1 of this Act:

(a) The term "Federal Antitrust laws" includes the following: (i) the Federal Trade Commission Act, 38 Stat. 717 (September 26, 1914), as amended; (ii) the Clayton Act, 38 Stat. 730 (October 15, 1914), as amended; and (iii) the Antitrust laws as such term is defined in Section 1 of the Clayton Act (15 U.S.C. Sec. 12).

(b) The term "unit of government" means (i) a state, its agencies, instrumentalities, political subdivisions and public bodies established pursuant to state law, and (ii) the elected or appointed officials, officers, agents, employees or representatives of a unit of government when acting on behalf thereof.

The CHAIRMAN. Thank you very much.

Are there any questions any of you would like to ask the others since you are on opposite sides?

Mr. LOVENDUSKY. I would hope there would be additional hearings on this legislation.

The CHAIRMAN. I doubt that there will be. If you have anything additonal, submit it to the chief counsel of the committee.

Mr. LOVENDUSKY. We have heard a lot from local governments, from counties and cities. It would be interesting to hear from the States themselves and from organizations such as the National Conference of State Legislators——

The CHAIRMAN. We invited them all to come here today and they had their chance to come. We invited the Attorneys General Association, the Governors Association, and State legislators, and none of them came. They were welcome to have come if they wanted to. If they want to submit statements, they may do it. But presently I do not think there will be any more hearings.

[The following were received for the record:]

STATEMENT OF GERALD L. BALILES
ATTORNEY GENERAL OF VIRGINIA
ON BEHALF OF THE
NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

The question before this Committee is whether local governments in this country should be exempt from the application of federal antitrust laws. It is an issue of concern, a topic of debate, in governmental circles at all levels of public service. I appear this morning for the purpose of presenting the views of the National Association of Attorneys General on this subject.

Many decisions of the Supreme Court of the United States generate public discussion, debate, and writings. Community Communications Co., Inc. v. City of Boulder, 455 U.S. 40 (1982), was such a case. Although Boulder itself did not break new legal ground, it had the effect of raising the awareness of local governing bodies to the fact that they are subject to the federal antitrust laws. Overnight they became sensitive to their antitrust exposure in hundreds of areas where local governments traditionally operate.

Commonly expressed fears include: (1) the spectre of huge treble damage awards bankrupting localities or significantly increasing the burden of taxpayers; (2) the high cost of defending antitrust suits, regardless of their merit; (3) the effective paralysis of certain local activities which have uncertain antitrust consequences; and (4) the lack of expertise in antitrust counseling and litigation on the part of overburdened local government attorneys. These concerns have led to numerous requests for remedial legislation at the federal and state levels. The purpose of such legislation would be, in one form or another, to immunize local governments from antitrust scrutiny.

In many States, the Office of Attorney General is the office on the state level generally charged with enforcement of state and federal antitrust laws. Attorneys General also have considerable contact with local government units, especially in States such as Virginia, which are Dillon Rule jurisdictions; that is, the state legislature must authorize each activity in which a local government engages.

In 1982, Virginia, along with other States, received inquiries from local governments concerning the impact of *Boulder*. One of the responses to the inquiries and concerns of the cities and counties was the formation of a special Committee by the National Association of Attorneys General in July 1982 to review the matter. Based on a report prepared by the Committee, the National Association adopted a resolution in June of 1983 setting forth the position of the Association at that time. The position of the Association was formulated prior to the actual introduction of legislation in Congress. The Association did have the benefit of a draft bill which was later to be introduced as S. 1578. The Supplemental Report, adopted by the Association in June of 1983, contains a brief analysis of the S. 1578 draft at pages 7 and 8. The primary concerns with what became S. 1578 involved confusion stemming from lack of precise terms or definitions, and ambiguity regarding the circumstances under which immunity would be available. The reasons for these concerns are found in the underlying rationale set out in the Association's reports and resolution. That rationale, I believe, is a valid and valuable guide for making the policy and drafting decisions required of this Committee and Congress itself.

This Committee has received a copy of the Association's reports and resolution, all of which contain the history and case development discussed in this area of the law. Rather than repeat those findings and conclusions here, it should be more instructive if we were to focus on some of the significant factors that you should consider.

First, we should not lose sight of the reason for the federal antitrust laws[1] - a national policy of competition in the marketplace.[2] This policy is not without its limits, and one such constraint is the principle of federalism.

It is the structure of our nation which caused the Supreme Court of the United States to hold that the States retained the right to establish certain state policies which might be anticompetitive in nature, so long as such policies were clearly articulated, affirmatively expressed, and actively supervised by the State.[3] In so doing, not only was the principle of federalism maintained, but the practical necessity was recognized of allowing appropriate programs, although of a monopolistic or otherwise anticompetitive nature, to be undertaken for the betterment of the States' citizens.

These activities are permitted only as a part of a regulated governmental policy. This "state action immunity," as the policy is now commonly referred to, is not automatically applied to all actions stemming from state regulatory activity. States have been held liable for violation of the federal antitrust laws. See Goldfarb v. Virginia State Bar, 421 U.S.. 773 (1975).

At the time of the Goldfarb case, activities of local governments were assumed to have an immunity similar to that of the States. In the initial case in 1978, however, the Supreme Court made it clear that the anticompetitive action of a city, like a State, was not immune from antitrust attack.

In City of Lafayette v. Louisiana Power and Light Company, 435 U.S.. 389 (1978), the Court reiterated the principles of federalism applicable to the situation, and held that the cities' actions, although not automatically exempt, may have the state action immunity if they were undertaken "pursuant to state policy to displace competition." 435 U.S.. at 413. The Court said that the action must stem "from the authority given a governmental entity to operate in a particular area," and that the "legislature [must have] contemplated the kind of action complained of." 435 U.S.. at 415.

If one could predict controversy over Supreme Court decisions, this 1978 case should have been the lighting rod for the concern of the cities presently being expressed. It did not happen. Perhaps because the Lafayette opinion was a plurality, rather than a majority, no outcry was raised. Four years later, when the Court basically reiterated its prior position, albeit in a majority opinion in Boulder, the cries of alarm and the calls for action were heard around the country.

While the reasoning of the Supreme Court in the Lafayette and Boulder cases is consistent with antitrust principles enunciated in prior cases and should not be lightly discarded, the National Association of Attorneys General recognizes that the Court has not addressed a number of issues involved in the application of the antitrust laws to local governments. Examples of these include the requirement or degree of necessary state supervision,[4] appropriate standards for judging the actions of governmental entities,[5] and appropriate remedies.[6]

These unanswered questions give rise to legitimate local government concerns. The Association believes local governments are entitled to some certainty in the law, to some indication of the circumstances in which their actions would be immune from, or liable under, the federal antitrust laws.

One option that would confer that certainty would be a grant of absolute immunity from the federal antitrust laws. Yet, the Association believes that this would not be a wise policy decision. While it is difficult to identify many specific incidents where the actions of a city or other local government unit have been so egregious that antitrust liability was applied, there is at least one recent district court case in which a city has been assessed damages.[7] Numerous antitrust cases have been brought against local governments, however, in recent years. But to exclude allegedly anticompetitive actions entirely from judicial review may leave an injured party without adequate recourse and allow such actions to go unchecked.

Another option at the other end of the spectrum is to do nothing, to leave the law as it is. Two years ago, this would have been patently unfair to the local governments because of the uncertainty of the law in areas mentioned above. Today, the law is becoming somewhat clearer. Let me explain. Four federal Circuit Courts of Appeal have now considered the standards for judging anticompetitive activity of local governments.[8] The results have been consistent among the circuits and with prior Supreme Court decisions. The National Association of Attorneys General believes these recent opinions do give guidance to local governments, to state legislatures, and provide a more acceptable framework. These standards for the application of immunity are:

(1) there must be proper state legislative authority for the local government conduct in question;

(2) the challenged anticompetitive effect of the conduct must be a necessary or reasonable consequence of engaging in the authorized conduct;

(3) the challenged conduct need not be mandated by state legislation, only permitted;

(4) state supervision of the local government activity is not required.

These standards obviously have not been adopted nationwide - not all circuit courts of appeal nor the Supreme Court have had an opportunity to consider the question. Consequently, the Association has stated its belief that the embodiment of these standards in federal legislation may serve to provide the appropriate and needed guidelines for local governments in this area. The Association strongly believes that the needs of economic competitive interests must be balanced with legitimate governmental interests. The courts have done this and, we believe, Congress, if it chooses to act in this area, should do likewise.

A final, but no less important, consideration is the clarity of any legislation which may be adopted. It will do the local governments little good if they must litigate the meaning of congressional words prior to litigating the immunity or liability issue itself. This task, embodying policy questions as well, may be the most difficult you face. It involves initially which units of local government you may wish to immunize - city council action, zoning boards, planning commissions - the list goes on into hundreds of policy-making areas.

Once you have made that decision, the actions of local governments themselves must be addressed. Very persuasive arguments can be made for immunity distinctions based on governmental or proprietary functions. But how to define that distinction can prove to be an imponderable task. The courts appear to have abandoned this approach.[9] Is the provision of cable television to subscribers' homes a traditional governmental function? If the running of a hospital is a governmental function worthy of immunity, does such immunity extend to the policies involved in the pricing and the selling of prescriptions by that hospital?

If cities are to be granted "the same immunity as a state," how is that to be judged? Without further explanation, how is it to be determined that a given act is part of an affirmatively expressed and clearly articulated policy? In many circumstances, the action taken by a local government in one instance, zoning concessions given to attract industry for example, will be different than in other areas of the jurisdiction. Will the city lose its immunity unless consistent zoning concessions are given to each new development?

There is a fundamental difference between the roles of state and local government and between the way policy is decided and carried out on each level. A state legislature decides policy; state agencies carry it out. In many instances, on the local level, the policy and its execution in given situations are within the control of the same entity. The cable television cases are a good example.

As a matter of policy, should the more than 62,000 units of local government be able to set and administer their own policies in this area without any restrictions or guidance from the national or state governments?

And finally, what will be the status of the private company which received the exclusive franchise from the local government and is the co-defendant in an antitrust suit? Does that company share in the immunity? If not, will that company have to bear the total damage burden which would have been shared, but for the immunity?

Perhaps I have raised more questions than I have answered. In dealing with this issue over the past two years in my State and as Chairman of the Special Committee created by the Association, I have found that these or similar questions remain after hours of discussion and review.

There is no easy answer, if any answer at all. The Circuit Courts of Appeal have come closest to giving the needed guidelines for local governments and balancing the interests involved. In Virginia we have attempted to respond to these court decisions. The Virginia General Assembly has been responsive to the requests of local governments in this area, where appropriate. We have passed legislation providing clear state policy which may result in acknowledged anticompetitive activity in the area of cable television franchising, taxicab regulation and refuse collection.[10] I trust we will continue to be responsive.

Should this Committee and - ultimately, the Congress - decide that federal legislation is appropriate, I urge you to consider both the problems and fears of the local governments, and the importance of a competitive marketplace in our nation. The problems outlined by Professor Areeda, testifying before this Committee in 1982, are still with us:

> The problem with drafting legislation is that one does not wish to immunize unintended cases, and one must consider the far out possibilities. Draftsmanship is very difficult in this area.[11]

Thank you, Mr. Chairman, for allowing the Association to express its views on this important topic of concern.

Footnotes

1. Sherman Act, 15 U.S.C. §§ 1-7 (1890); Clayton Act, 15 U.S.C. §§ 12-27 (1914); Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §§ 1, 15c-15g, 16, 18a, 2b, 66, 1311-1314, 18 U.S.C. § 1505, 28 U.S.C. § 1407.

2. *United States v. Topco Associates*, 405 U.S.. 596, 610 (1972).

3. *Parker v. Brown*, 317 U.S.. 341 (1943).

4. *Boulder*, 455 U.S.. at 51, n.14.

5. *Lafayette*, 435 U.S.. at 417, n.48.

6. *Lafayette*, 435 U.S.. at 401-402; *Boulder*, 455 U.S.. at 56, n.20.

7. *Unity Ventures v. County of Lake, Illinois*, 81 C. 2745, January 12, 1984. Antitrust liability was imposed by the Fifth Circuit Court of Appeals in *Affiliated Capital v. City of Houston*, 700 F.2d 226 (1983), against the mayor; however, the city was dismissed from the action at the district court stage.

8. *Town of Hallie v. City of Eau Claire*, 700 F.2d 276 (7th Cir. 1983); *Gold Cross Ambulance Service v. City of Kansas City*, 705 F.2d 1005 (8th Cir. 1983); *Affiliated Capital v. City of Houston*, 700 F.2d 226 (5th Cir. 1983); *Golden State Transit Corp. v. City of Los Angeles*, ___ F.2d ___ (9th Cir. 1984), 1984-1 Trade Cas. ¶ 65,878 (CCH February 28, 1984).

9. Although this distinction was relied on by Chief Justice Burger in *City of Lafayette*, 353 U.S.. at 418, the Court in *Boulder* apparently disregarded the distinction. *Boulder*, 455 U.S.. at 55, n.18.

10. Va. Code § 15.1-23.1 (1981), House Bill 586, House Bill 694, Senate Bill 91, 1984 Session, Virginia General Assembly.

11. *Local Government Antitrust Liability: The Boulder Decision*, Hearings Before the Committee on the Judiciary of the United States Senate, 9th Congress, 2nd Session (1982), Statement of Professor Phillip Areeda, Harvard Law School, p. 21.

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
July 1982

REPORT AND RECOMMENDATION OF THE ANTITRUST SUBCOMMITTEE TO STUDY LOCAL GOVERNMENTAL IMMUNITY

I. INTRODUCTION

In Community Communications Co. v. City of Boulder, ____ U.S. ____, 102 S. Ct. 835 (1982), and City of Lafayette v. Louisiana Power and Light Co., 435 U.S. 389 (1978), the Supreme Court determined that local governmental units are not immune from the operation of the federal antitrust laws unless their anticompetitive activity is in furtherance or implementation of a "clearly articulated and affirmatively expressed state policy."

Because of the potential antitrust liability for local governmental activity posed by these decisions, local governments and their organizations have proposed various legislative alternatives seeking immunity. 1/ Local governmental officials have also voiced their concerns to state legislatures and state officials including state attorneys general.

In response, a resolution of this Association was passed at the Annual Meeting in Mackinac Island to appoint a subcommittee to analyze the impact of the Supreme Court decisions, communicate with representatives of the state and local governmental organizations, study the advisability of proposed federal legislation, and recommend a position for the Association's consideration.

This Report addresses this complex question. The Report discusses the genesis of the state action doctrine as it relates to local governmental immunity; discusses the underlying antitrust policy considerations of the Supreme Court decisions; discusses the present impact of antitrust litigation on local government; discusses concerns expressed by local governments; evaluates the various federal legislative proposals of state and local public interest groups and organizations, and reviews the legislative and other choices available at the state level.

1/ Federal legislative proposals are discussed at Part V, infra.

II. STATE AND LOCAL GOVERNMENT ANTITRUST IMMUNITY: THE PARKER DOCTRINE

A. Parker v. Brown

An analysis of the status of antitrust immunity for local governments must begin with an examination of the origins of the state action exemption itself. The state action doctrine, as formulated in Parker v. Brown, 317 U.S. 341 (1943), is a judicially created exemption based upon an interpretation of Congressional intent. In Parker, the California Agricultural Prorate Act established a marketing program which was designed to stabilize the price of raisins by restricting competition among the producers and limiting the quantity of raisins which would be permited to enter the market.

The Supreme Court held that the Prorate Program was immune from attack under the Sherman Act. Noting that California's program derived its authority from the legislative command of the state, the Court found nothing in its examination of the language or the legislative history of the Sherman Act which suggested an intent to restrict legislatively directed action of a state, its officers, or agents. 317 U.S. at 350-351. The Court found that the concept of federalism demanded that no such intent be inferred:

> [I]n a dual system of government which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

Id.

B. Goldfarb and Bates

The contours of the Parker doctrine were further defined by a series of subsequent Supreme Court decisions. In Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), the Court ruled that an attorney title search minimum fee schedule enforced by the Virginia State Bar was not immune under Parker since the price fixing was essentially a private activity not compelled or required by the state.

Conversely, in Bates v. State Bar of Arizona, 433 U.S. 350 (1977), the Court held that the antitrust laws did not apply to a ban on attorney advertising which was directly imposed by the Arizona Supreme Court. The state's policy against attorney advertising was "clearly and affirmatively expressed" in the disciplinary rules and was actively supervised by the Arizona Supreme Court in enforcement proceedings. 433 U.S. at 362.

C. Cantor

A program of a private utility to provide free light bulbs to customers was attacked as a restraint of trade, attempted monopoly, and tie-in arrangement in Cantor v. Detroit Edison, 428 U.S. 579 (1976). The Court held that the program was not exempt under Parker simply because the utility was subject to state regulation. The Court found no state legislative policy to displace the antitrust laws in the provision of light bulb exchange services. In the Court's view, it is the state regulatory statute, not the regulatory agency approval which must be the source of the state policy to displace competition. 428 U.S. at 597-98.

D. Lafayette

City of Lafayette v. Louisiana Power and Light Co., 435 U.S. 389 (1978), first examined the extent of immunity to be granted local governmental units. In Lafayette, a city-owned and operated electric utility filed an antitrust action against its private competitor, an investor-owned utility with which the city competed in areas beyond its city limits. The defendant counterclaimed, alleging illegal tie-ins and other antitrust violations by the city. The city defended, claiming that its alleged anticompetitive activities were immune under Parker. The Supreme Court disagreed.

The Court refused to infer a congressional purpose to exempt cities from the antitrust laws. A majority of the Court ruled that political subdivisions are persons under the antitrust laws and therefore subject to suit. The Court reasoned that it is no more anomalous to require compliance by municipalities with the antitrust laws than with other substantive federal laws. The Court rejected the argument that "the antitrust laws are intended to protect the public only from abuses of private power, and not from actions of municipalities that exist to serve the public weal." 435 U.S. at 403. The Court noted how the allegations of the counterclaim clearly illustrate the impact actions by local governments as purchasers, suppliers, or competitors may have on individuals and businesses.

The Court also rejected the argument that because local governments are controlled through the political process, that federal antitrust regulation is unnecessary. The Court held that Congress

> did not leave this fundamental national policy of competition to the vagaries of the political process, but established a broad policy, to be administered by neutral courts, which would guarantee every enterprise the right to exercise "whatever economic muscle it can muster," without regard to the amount of influence it might have with local or state legislatures.

435 U.S. at 406-07 (citation and footnotes omitted).

Finally, the Court reasoned that if the 62,437 units of local government were "free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects," 435 U.S. at 408, such a result would be contrary to the comprehensive policy of free competition Congress has established.

A plurality of the Court in an opinion written by Justice Brennan held that, although not automatically exempt, the actions undertaken by local governmental units may reflect state policy. The plurality concludes that local governments could avail themselves of the Parker exemption, only if their anticompetitive conduct were "pursuant to state policy to displace competition with regulation or monopoly public service." 435 U.S. 413.

A specific and detailed legislative authorization was not required. Rather, "an adequate state mandate for anticompetitive activities of cities . . . exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.'" 435 U.S. at 415, (emphasis added; footnotes and citations omitted). However the plurality noted, 435 U.S. at 410, that such a state policy to displace competition at the local level must be "clearly articulated and affirmatively expressed," relying upon Bates, 433 U.S. 350. This "clear articulation and affirmative expression" test has been consistently followed by a majority of the Court. New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96 (1978), California Retail Liquor Dealers Association v. Midcal Aluminum, 445 U.S. 97 (1980).

E. Midcal Aluminum

Midcal Aluminum involved a California statutory scheme under which a wine wholesaler could not sell to a retailer without adhering to a uniform price schedule or fair trade contract filed with the state. In addition to reaffirming the "clearly articulated and affirmatively expressed" standard, the Court added that the challenged restraint itself must be actively supervised by the state. 445 U.S. at 105. Applying these tests, the Court found that although the resale price maintenance scheme was affirmatively expressed, the program failed because there was no active state supervision. Aside from authorizing the price fixing, and enforcing prices established by private parties, the state had no other involvement in the plan. The state did not engage in a review of the prices, regulate the terms of the fair trade contracts, or monitor market conditions. In the Court's view, "[t]he national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price fixing arrangement".

Thus, prior to Community Communications Co. v. City of Boulder, __ U.S. _, 102 S.Ct. 835 (1982), the most recent pronouncement on the Parker doctrine, the Supreme Court in five decisions had clearly set forth the parameters of the state action and local governmental immunity doctrine.

F. Boulder

In Boulder, the Supreme Court reviewed the application of the Parker doctrine to home rule units. The City of Boulder, through its constitutional home rule powers, had enacted an ordinance which imposed a moratorium on geographical expansion by the only cable television company licensed to operate in the city. Except for the grant of general home rule powers, the state had expressed no policy on the subject of cable television. The claimed purpose of the moratorium was to avoid discouraging potential competitors while the city prepared new cable legislation.

The Supreme Court determined that in order for the City of Boulder to avail itself of Parker immunity for its alleged anticompetitive activities, its conduct must either constitute the action of the state itself acting in its sovereign capacity or local governmental action in furtherance or implementation of "clearly articulated and affirmatively expressed state policy". 102 S.Ct. at 841.

With respect to the first alternative, the Supreme Court rejected the argument that the moratorium ordinance, as derived under home rule, was an act of government performed by the City of Boulder acting as the state in local matters. Relying on Lafayette, the Court held that the actions of home rule cities are not equivalent to the action of the state itself for purposes of the Parker exemption. Since Parker reflected Congress' intention to embody the principle of federalism in the Sherman Act, such principle had its own limitations: "Ours is a 'dual system of government' . . . which has no place for sovereign cities". 102 S.Ct. at 842 (emphasis in original; citation omitted).

With respect to the second alternative, the Court, relying upon Lafayette, Fox, and Midcal, held that the "clear articulation and affirmative expession" standard was not satisfied by the broad home rule authority conferred by Colorado's constitution: "Acceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances—would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that our precedents require." Boulder, 102 S.Ct. at 843. A state that allows its muncipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought. 102 S.Ct at 843 (emphasis in original). [T]he requirement of "clear articulation and affirmative expression" was not satisfied when the State's position was one of mere neutrality respecting the muncipal actions challenged as anticompetitive.

Further, the Court was not persuaded that its decisions would have serious adverse consequences for cities. Quoting Lafayette, the Court reiterated that its decisions meant nothing more than that " 'when the State itself has not directed or authorized an anticompetitive practice, the State's subdivisions in exercising their delegated power must obey the antitrust laws.' " 102 S.Ct. at 843-44 (quoting Lafayette, 435 U.S. at 416).

Justice Rehnquist's dissent, raising arguments addressed in Lafayette, 435 U.S. at 416, asserted that the majority's opinion would "impede, if not paralyze" local government efforts to protect public health, safety and welfare, and would undermine home rule by radically changing the relationship between states and their political subdivisions. Justice Stevens, in his concurring opinion, pointed out that the dissenters' "dire predictions . . . should . . . be viewed with skepticism" because it necessarily assumes that holding municipal actions subject to antitrust scrutiny is tantamount to finding an antitrust law violation. 102 S.Ct. at 844 (concurring opinion of Stevens, J.).

G. Unanswered Questions

The development of the *Parker* doctrine to date leaves unanswered several questions relating to the application of the antitrust laws to state and local governments. When dealing with state government regulation, the Court has refused to grant *Parker* immunity if the state does not actively supervise the restraint on trade. *Midcal*, 445 U.S. 97. The Court in *Boulder* and *Lafayette* did not reach the issue of active supervision of the regulated activity. Consequently, the question remains whether active state supervision of local government conduct will be required, or is active local government supervision sufficient to meet the *Parker* immunity test. *Compare Boulder*, 102 S.Ct. at 841 n.14, *with* 102 S.Ct. at 851 n.6 (dissenting opinion of Rehnquist, J.).

Another unanswered question deals with what remedies may be appropriately applied to local governments. The antitrust laws provide for treble damages and attorneys' fees. 15 U.S.C. §15. Both *Boulder*, 102 S. Ct. 843 n.20, and *Lafayette*, 435 U.S. at 401-02, specifically avoided the issue of remedies. The *Lafayette* Court, however, intimated that remedies available for private antitrust violations may not be appropriate for governmental violations.

A third unresolved issue relates to the antitrust standard by which alleged anticompetitive activity of local governments will be judged. Alleged anticompetitive activity is traditionally judged by a *per se* or rule of reason standard. *Boulder* and *Lafayette* explained that '"[i]t may be that certain activities, which might appear anticompetitive when engaged in by private parties take on a different complexion when adopted by a local government. Neither Court addressed the standard by which to judge governmental activity. The *Lafayette* Court, however, did indicate that public policy, as well as competitive concerns, may be considered in evaluating the legality of governmental action under the rule of reason. 435 U.S. at 417 n. 48 (cited in *Boulder*, 102 S.Ct. at 843 n.20).

III. POLICY CONSIDERATIONS UNDERLYING BOULDER AND LAFAYETTE

The decisions in Boulder and Lafayette are consistent with the governmental and antitrust policies of the Parker state action decisions. The cases stand for the proposition that local governments shall not receive immunity from the antitrust laws for their anticompetitive actions taken solely on their initiative and without authorization and direction from the state which created them.

Both decisions are grounded upon concepts of sovereignty and federalism. They contrast the overriding national economic policy of free competition with "the serious economic dislocation which would result if cities were free to place their own parochial interests above the Nation's economic goals . . . " Boulder, 102 S.Ct. at 840 (quoting Lafayette, 435 U.S. at 412-13).

A. FEDERALISM

The principles of federalism, which are the foundation of the Parker doctrine, are pivotal to the conclusion that the Parker exemption does not permit treatment of muncipal action as state action. Indeed no other conclusion could be reached consistent with our federalist system.

In Boulder and Lafayette, the Supreme Court reiterated the fundamental concept that we are a nation of states, not city states: " 'Cities are not themselves sovereign; they do not receive all the federal deference of the states that create them.' " Boulder, 102 S.Ct. at 840 (quoting Lafayette, 435 U.S. at 412-13). Parker's limitation of the exemption to official action directed by the state, 317 U.S. at 350-52, is consistent with the treatment accorded states subdivisions in Boulder and Lafayette.

The different status accorded cities and states under federal law is underscored by the Court's conclusion that local government action is state action for purposes of the 14th Amendment, but is not state action under the Parker doctrine. However, sovereign immunity accorded the states under the 11th Amendment has generally not been extended to municipal action. See, Lafayette, 435 U.S. at 412, citing Edelman v. Jordan, 415 U.S. 651, 667 n. 12 (1974); see also, 435 U.S. at 414 nn. 42, 43. Like the 11th Amendment, Parker immunity attaches to the state only because of its sovereign capacity. Municipal corporations are but political subdivisions distinct from the state as sovereign. Thus, similar to the 11th Amendment, the Parker doctrine is equally limited, framed in large measure by the Supreme Court's reluctance either to denigrate state sovereignty or to broaden antitrust immunity.

Another reason for different treatment was pointed out in Lafayette, 435 U.S. at 414 n. 44. Anticompetitive municipal actions taken under either Dillon's rule or home rule power may not necessarily reflect state policy, but may in fact be directly contrary to expressed or implied state policy favoring competition. A necessary consequence of our federalist system is that local government action which conflicts with state policy cannot be accorded the same deference as that given state action conflicting with federal antitrust policy.

B. NATIONAL ECONOMIC POLICY

The Supreme Court was also plainly concerned with the effects its decisions would have on the federal policy favoring competition represented by the antitrust laws. In particular, the Court was concerned that local government action would undermine the national competition policy. Permitting thousands of governmental entities to become regulators of our economy without restraint and without consideration of the broader goals of national economic policy goals is not consistent with the principles underlying the enactment of the Sherman Act. The majority in Lafayette, 435 U.S. at 406-07, 408, explained these concerns as follows:

> In enacting the Sherman Act, however, Congress mandated competition as the polestar by which all must be guided in ordering their business affairs. It did not leave this fundamental national policy to the vagaries of the political process, but established a broad policy, to be administered by neutral courts, which would guarantee every enterprise the right to exercise "whatever economic muscle it can muster," United States v. Topco Associates, 405 U.S. 596, 610 (1972), without regard to the amount of influence it might have with local and state legislatures.

* * *

> These [local governmental] units may, and do, participate in and affect the economic life of this Nation in a great number and variety of ways. When these bodies act as owners and providers of services, they are fully capable of aggrandizing other economic units with which they interrelate, with the potential of serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender. If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established.

Similarly, the Court in *Boulder* firmly expressed its concern that extension of immunity to thousands of local governmental units, each with less than state-wide jurisdiction, would attack the "wisdom of the longstanding congressional commitment to the policy of free markets in open competition embodied in the antitrust laws". *Boulder*, 102 S.Ct. at 843.

IV. PRESENT IMPACT OF ANTITRUST LITIGATION ON LOCAL GOVERNMENTS

A number of cases have been brought against local governments alleging antitrust violations. (*See* Exhibit A.) Local government activities which have been or may be the subject of antitrust scrutiny include:

(1) land-use planning and zoning, including redevelopment, industrial revenue bonds and tax abatements;
(2) municipally-owned and managed businesses, including power and water utilities, mass transit;
(3) licensing, franchising and regulating business, including business and occupational licensing, regulation of commercial businesses, taxicabs, airport franchises, cable television;

(4) environmental management and resource recovery, including refuse collection, wastewater treatment, resource recovery operations;

(5) procurement and contracting, including public works construction and operations, competitive and sole-source procurement, contracting for operation of civic centers, stadiums and parks;

(6) health care services.

A search of reported decisions reveals that no local governmental unit to date has been found liable for an antitrust violation.

Even after Boulder, the courts appear to be finding immunity for local governments. For example in Gold Cross Ambulance v. City of Kansas City, 538 F. Supp. 956 (W.D. Mo. 1982), the state statute was not specific on the point in issue, no state supervision existed, and the system was not uniform throughout the state. Yet the court found immunity under Boulder standards for the exclusive ambulance service mandated by the city. See also Pueblo Aircraft Service v. City of Pueblo, 679 F.2d 805 (10th Cir. 1982), petition for cert. filed, August 18, 1982. Cf. Euster v. Eagle Downs Racing Association, 677 F.2d 992 (3d Cir. 1982), cert. denied sub nom. Euster v. Pennsylvania Horse Racing Commission, No. 82-501 (November 15, 1982) (state statute granted general supervisory power over horse racing to state agency, but did not clearly articulate the authority to set jockey fees).

Ever since Lafayette, it has been clear that local governments are subject to federal antitrust scrutiny. Under current case law, state action immunity may not be available because local government activities and state statutes were not designed with antitrust principles in mind. Until additional experience is obtained with the antitrust problems confronting local government liability and the questions of remedies, supervision, and standards for evaluating allegedly anticompetitive actions are answered the antitrust exposure laws of local governments will remain elusive.

V. CONCERNS EXPRESSED BY LOCAL GOVERNMENTS

As a result of the Supreme Court opinions and litigation, representatives of local governments have voiced a number of concerns. [2] The concerns can be placed in three categories: fear of increased financial liability, uncertainty regarding the antitrust consequences of their actions resulting in delay, and perceived changes in state-local relations. Many of these concerns arise from the unsettled state of the law discussed above. Compare Chapple, S., "Antitrust Liability of Cities After Boulder: 'State Action' and State Inaction," Antitrust Report, NAAG, March, 1982, with McMahon, T., "City of Boulder Revisited," Antitrust Report, NAAG, October, 1982.

A. Financial drain

In troubled economic times, the specter of an additional financial drain due to antitrust litigation is perhaps the concern most often expressed by local governments. The obvious cost would be treble damages and attorneys' fees if liability is found. [3] The cost of defending the litigation can also be great. Few local governments have in-house antitrust expertise. Even if the city attorney can handle the defense, the attorney may be named as a defendant. The legal fees of outside counsel and the actual costs of antitrust litigation in terms of discovery and employee time are significant concerns.

Another financial implication for local governments is the impact an antitrust suit may have on the municipal bond market. If a regulatory requirement is necessary to obtain bond financing for public projects, real or potential antitrust challenge to the regulatory scheme may result in the issuance of qualified opinions from bond counsel on revenue bonds that would in turn discourage bond underwriters from underwriting such bond issues.

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[2] The concerns set out in this paper represent a compilation of publications of, or remarks made by, the Honorable Tom Moody, Mayor, Columbus, Ohio, on behalf of the National League of Cities; Robert J. Logan, City Attorney, City of San Jose, California, on behalf of the National Institute of Municipal Law Officers, League of California Cities, City of San Jose; the Honorable Janet Gray Hayes, Mayor of San Jose, California, on behalf of The United States Conference of Mayors; the Honorable Hugh Allen, Jr., Mayor of Demopolis, Alabama, before the Senate Judiciary Committee on June 30, 1982. Additional comments were published by the National Institute of Municipal Law Officers.

[3] To date, no judgment of liability resulting in a damage award against municipality has been reported. See Part IV, supra, and Exhibit A.

B. Uncertainty

A second fear of local governments is the delay in acting or inability to act on a project. Advice on the antitrust implications of proposed activity will be time-consuming. The unsettled state of the law may result in no definitive advice, thereby eliminating a proposed activity. The process will also be expensive, not only if outside counsel is needed but also because delay can increase cost. Finally, local governments fear that the possibility of potential personal liability may dissuade individuals from seeking or accepting positions in local government.

C. State-Local Relations

The final major area of concern is the displacement of state and local spheres of authority. Conceptually, local governments perceive Lafayette and Boulder as creating a shift of local authority to the state. Specifically, cities dislike the prospect of being required to petition the state legislature for legislation conferring antitrust immunity. See Part VII, infra, for discussion of state legislative activity.

Local governments have noted that the ability of state legislatures to devote sufficient time to understand the problem, infrequent assembly and the effect of various lobby groups on the legislature and legislation as problems in obtaining a state legislative solution to their antitrust concerns. Even if state legislation is adopted, cities are concerned that it will not immunize local governments from antitrust attacks on past actions.

As a result of the problems discussed above, most local governments and groups representing local governments appear to believe that the only cost-effective, quick, and satisfactory remedy is an amendment to the federal antitrust laws.

VI. FEDERAL LEGISLATIVE PROPOSALS

No legislation providing for local government immunity from the antitrust laws has been introduced in Congress. The draft proposals generally fall into two categories: (1) a blanket exemption for local governments; and (2) a provision clarifying the standards to be met by a local government in order to obtain immunity. The following discussion will examine these proposals in light of the concerns expressed above and the policy considerations set out in Part III, supra.

A. BLANKET EXEMPTION LEGISLATION

A proposal of the National Institute of Municipal Law Officers would amend the Sherman Act, 15 U.S.C. §7, and the Clayton Act, 15 U.S.C. §12, to exclude units of local government and local officials from the definition of "person" for the purpose of being sued. This blanket exemption would remove local governments from antitrust scrutiny altogether. However, this proposal is directly contrary to the historical principles of federalism and national economic policy established by Congress and the federal judiciary. It would permit disruption of national economic markets based upon what the Supreme Court terms "the vagaries of the political process . . . counseled by [municipalities'] parochial interests . . . " Lafayette, 435 U.S. at 406-07, 408. In addition, this proposal provides greater protection to local governments than is presently accorded the states.

B. PROPOSALS TO CLARIFY STANDARDS FOR IMMUNITY

Proposals by the Conference of Mayors, National Conference of State Legislatures and National League of Cities vary, but generally provide for immunity if the action is taken pursuant to an affirmatively expressed policy. These proposals differ, both as to the entity which may express the policy (state vs. local government) and as to the entity supervising the implementation of the policy. None of these proposals successfully resolves the cities' fundamental concerns described in Part IV above.

Although these proposals may clarify the circumstances that would trigger immunity, litigation costs would undoubtedly be incurred in judicially establishing that the necessary criteria are met. The test of clearly articulated, and affirmatively expressed state policy which is actively supervised will have to be met in any of these proposals. Consequently, advice on the antitrust implications of a proposed activity would still be necessary because liability still exists if immunity standards are not met, the possible exposure of individuals and its impact on recruiting will not be measurably different under the proposals. If an antitrust violation were found, the local government would, under the proposals continue to be liable for treble damages and attorneys, fees. Finally, any impact on the municipal bond markep will depend on whepher the amendment would discourage suit.

VII. STATE LEVEL ACTIVITIES

Some states have attempted to amend existing statutes to confer state action immunity.[4] However, only recently has there been limited concerted activity by local governments or state legislatures to study the antitrust immunity of local governments pursuant to the state action doctrine.

In response to the concerns expressed by local governments, state governments can undertake several actions. A study committee can be established to review the problems facing local governments in this area and propose any necessary legislation. The state could enact specific single-shot legislation attempting to confer immunity in a specific area.

State study committees have been convened by Governor Hughes of Maryland, Attorney General Baliles of Virginia, and the Colorado legislature. Neither the Virginia nor the Maryland committee has issued a final report. On September 9, 1982 following a number of hearings, the Colorado legislative committee unanimously recommended against adopting legislation to immunize local governmental units.[5] The Colorado legislative committee found that broad-based legislation, which generally would grant immunity for local government units, would not meet the requirements of the case law and therefore would be ineffectual. The committee believed that such immunity could act to protect abuses by public officials, and because of the questions left unanswered by the Supreme Court, such as the required supervision, legislation at this time would be precipitous. The comments of the Colorado legislature addressed both the broad-based immunity legislation, as well as specific regulatory activities of local governments. The "active state supervision" question apparently was viewed as one which would necessarily lead to state involvement in local government activity, and therefore, immunizing legislation, even on a single-activity basis, was viewed as undesirable. Once a state decides to legislate in this area, the difficulties manifest themselves in a number of different ways.

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[4] See, e.g., §§ 15. 1-1269, 15.1-1250, 15.1-879, Code of Virginia, amended in 1979, to clarify the power granted by the Commonwealth to Southeastern Public Service Authority and its member cities and counties to control any or all of the waste streams of their jurisdiction.

[5] See Exhibit B.

Legislation involving specific activities has been enacted by a limited number of state legislatures. The States of Virginia, Maryland and Michigan have enacted legislation aimed at the granting of cable television franchises. The Michigan statute was designed to exempt local governments from the application of the Michigan antitrust laws. The Virginia statute was designed to allow local governments to meet the test for state-action immunity.[6]

To articulate clearly and express affirmatively a state policy for displacement of competition requires language clearly "contemplating" the anti-competitive activity. This can require a statement for each activity. Yet, to allow for the distinction and needs among the various political subdivisions, the statement must also allow flexibility. Such flexibility undercuts the strength of the state policy. The second part of the test for state-action immunity, active state supervision, presents an even greater obstacle. There has been no judicial resolution of the nature of supervision required when a local government is confronted with antitrust litigation.

In addition to the legislation and study committee activity, some states have undertaken a program to alert local governments to the antitrust liability which they are facing.[7] Some Attorneys General are working with statewide organizations comprised of local government officials and staff members to provide speeches, seminars, and other material alerting the local government to this problem.

VIII. CONCLUSION

The present state of the law affords local governments immunity from antitrust liabiity if certain factors are met. If the anticompetitive conduct is undertaken pursuant to a clearly articulated and affirmatively expressed state policy, which is actively supervised by the state, immunity will be conferred. This standard has evolved through judicial balancing of the principles of federalism and national economic policy. Further clarification of this standard will undoubtedly occur as the courts are presented with specific questions, such as supervision, appropriate remedies, and the considerations, if any, to be given the nature of the governmental activity and a governmental party.

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[6] See Exhibit C.

[7] Virginia has sponsored seminars; Delaware and Iowa are contemplating antitrust programs on this issue.

Consistent with judicial reasoning, significant activity can be undertaken on the state level to clarify the areas where state policy authorizes anticompetitive action by local governments. State officials including the Governor, Attorney General, members of the state legislature and representatives of local governments should study the statutory framework of local governments. Such action can provide direction on the state and local legislative levels in deciding what further steps must be taken, both to insure local government immunity where appropriate, and to assist local governments in avoiding activity which needlessly invites antitrust attack.

Treatment of the immunity issue on the federal level requires sensitive balancing of factors. These factors include the need of local governments to be able to conduct their affairs without fear of unmeritorious litigation, recognition of a national economic policy of free and open competition, and the interests of the states in providing a consistent approach to the marketplace within their boundaries. Despite the concerns expressed by local governments over exposure to antitrust liability since the Lafayette decision in 1978, no specific legislation has been introduced on the federal level to address the problems. Additionally, no local government has yet been held to have violated the antitrust law and incurred the treble damage penalty. Until examination can be made of specific proposals in light of all the relevant interests, and of further experience with the actual problems of local governments, a definitive position is premature. There should be continued communication among the affected organizations, such as the National Governors' Association, the National League of Cities, the Conference of Mayors, and the National Conference of State Legislatures. The Executive Committee of the National Association of Attorneys General should be kept advised of emerging trends and proposals, and when appropriate, a recommendation for an appropriate positon for the Association should be presented.

EXHIBIT A

Airport Services and Concessions

1. Pueblo Aircraft Service, Inc. v. City of Pueblo, 498 F.Supp. 1205 (D. Colo. 1980), aff'd, 679 F.2d 805 (10th Cir. 1982), pet'n for cert. filed, 51 U.S.L.W. ______ (U.S. Aug. 18, 1982) (No. 82-352). Antitrust suit brought by an unsuccessful applicant for concession space at a municipal airport. Held--The city was immune from antitrust action.

2. Greyhound v. City of Pensacola, 676 F.2d 1380 (11th Cir. 1982) (damages claimed $500,000.00). Disgruntled franchisee alleged that denial of a license to operate a rent-a-car facility at the municipal airport violated antitrust laws. Jury verdict in favor of Greyhound under Sherman Act § 1 reversed by 11th Cir. due to absence of "joint action." City was not induced to adopt any particular specifications or definitions in its bid package, and city had no discussions or contacts with any bidders regarding those matters. Accordingly, requisite contract or conspiracy lacking.

3. Woolen v. Surtran Taxicabs, Inc., 461 F.Supp. 1025 (N.D. Tex. 1978) (damages claimed $3,000,000.00). Action brought challenging single operator award for ground transportation at municipal airport. Held--Defendant cities were not entitled to state action immunity absent showing that establishment and enforcement of taxicab service at airport was pursuant to state policy to replace competition with regulation or monopoly public service. Such showing was not made on basis of provisions of Texas statute and Constitution concerning powers of home rule cities.

4. B&W Aero Corp. v. Manchester Airport, Civ. No. 80-427-D (D. N.H. 1981) (damages claimed $1,000,000.00). Antitrust action brought challenging the sale of fuel by the municipality at the municipal airport.

5. Pinehurst Airlines v. Resort Air Service, 476 F.Supp. 543 (M.D. N.C. 1979). Action brought alleging municipal award of an exclusive grant to a fix-based operator violated antitrust laws. Held--Defendants were not entitled to governmental immunity as a matter of law because of the nature of the activity.

6. Guthrie v. Genesee County, 494 F.Supp. 950 (W.D. N.Y. 1980). Suit brought alleging that municipal award of an exclusive operating agreement at the municipal airport violated antitrust laws. Held--Defendants were not immune from antitrust action. The defendants

failed to establish that the legislature contemplated the action allegedly engaged in by defendants, or that the state manifested a policy to displace competition with regulation or monopoly public service; no state regulatory interest was identified, and the statute did not evince an unambiguous intent by the state to replace competition with monopolistic public service.

Cable Television Regulation

1. Community Communications v. Boulder, 102 S.Ct. 835 (January 13, 1982). Suit based on challenge to moratorium instituted to increase competition among cable television providers. Held--The moratorium ordinance enacted under city's "home rule" authority did not enjoy "state action" exemption, since direct delegation of powers to city through home rule amendment to Colorado Constitution did not render ordinance "act of government performed by city acting as state in local matters," and because state's position was one of mere neutrality respecting ordinance.

2. Melhar Corp. v. City of St. Louis, Civ. No. 81-0671c(4) (E.D. Mo. 1981), appealed to 8th Cir. Court of Appeals, No. 82-1064 (damages claimed $24,000,000.00). Suit concerns revocation of a franchise to operate a cable television franchise.

3. William Danks v. City and County of Denver, No. 82-CV-0484 (D.C. Colo. 1982). Action challenges award of an exclusive franchise to operate a cable television system in Denver, Colorado.

4. Hopkinsville Cable TV v. Pennyroyal, C.A. No. 81-0270-P (W.D. Ky. 1982), appealed to 6th Circuit Court of Appeals. Suit brought alleging that the award of a franchise after competitive bidding to operate a cable television franchise violated antitrust laws.

5. Affiliated Capital v. City of Houston, 519 F.Supp. 991 (S.D. Tex. 1981), appeal docketed, No. 81-2335 (5th Cir. Aug. 25, 1981). Antitrust suit brought challenging the municipal award to various franchisees of contract to operate cable television franchise. Held--Jury verdict in favor of plaintiff was not sustained because of the deficiency of evidence of causation; therefore, immunity issue need not be addressed.

6. Omega Satellite Products v. City of Indianapolis, No. 82-339c (S.D. Ind. 1982) (damages unspecified). Antitrust action brought challenging municipal policy of

refusing to permit the placing of coaxial cables across public thoroughfares without a franchise. Held--Court found no evidence of any agreement, express or implied, regarding any restraint of trade/competition between city and any cable tv company. Cable tv code was equally applicable to all cable system operators alike. City's determination that market forces could not properly guide development of city's cable tv industry was not necessarily inconsistent with purposes of antitrust laws. Accordingly, plaintiff's request for preliminary relief denied, because no substantial likelihood of prevailing on merits.

Contracts

1. *Suttles v. City of Dayton*, No. 76 1055 (Oh. Comm. Pls.) (damages claimed $1,000,000.00). Suit involved an award of a contract for security services at a park.

Health Care Services

1. *City of Fairfax v. Fairfax Hospital Association*, 562 F.2d 280 (4th Cir. 1977), *vacated and remanded*, 435 U.S. 992, *remanded further on remand*, 598 F.2d 835 (1978), *cert. denied*, 449 U.S. 1123 (1980). City and physicians brought antitrust action against county industrial development authority, county hospital association, and others, seeking injunctive relief. Court's view of the present scope of the "state action" exemption was not set forth. The case is on remand to the district court.

Hospital and Ambulance Services

1. *Capital Ambulance v. Columbia, South Carolina*, C.A. No. 80-670-6 (D. S.C. 1980). Suit brought alleging restraint of trade in operation of private ambulance services.

2. *Huron Valley Hospital v. City of Pontiac*, 466 F.Supp. 1301 (E.D. Mi. 1979), *vacated on other grounds*, 666 F.2d 1029 (6th Cir. 1982). Suit brought alleging that municipal hospital sought to exclude competition in the provision of health care facilities. Held--Regulatory actions of the Michigan Department of Public Health Planning Council of Southeastern Michigan relating to establishing new hospitals and reviewing and making recommendations to state planning agencies with respect to proposed new institutional health services were exempted from antitrust laws under "state action" defense.

3. United Pacific Ventures v. Mercy, Civ. LV. 80-163, RDF (D. Nev. 1981) (damages claimed $420,000.00). Disgruntled licensee for ambulance service brought suit against the municipality alleging that the denial of a license to operate violated antitrust laws.

4. Gold Cross v. City of Kansas City, Mo., ____ F.Supp. ____ (W.D. Mo. 1982). Antitrust action brought by disappointed licensee objecting to municipality's refusal to issue a license to him to operate an ambulance service. The city was immune under state action exemption where active state supervision was present through state licensing laws and city enforcement of its ordinance to insure high quality ambulance service and short response time.

Land Leasing

1. Spangler v. City of Los Angeles, CV-F-80-283 EDP (E.D. Ca. 1980) (damages claimed $1.2 million). Action brought alleging that the leasing of public lands constituted an attempt to monopolize under various antitrust laws.

Land Use and Zoning

1. Scott v. City of Sioux City, No. C79-4009 (No. D. Ia 1979) (damages claimed $5,000,000.00). Antitrust action brought by disappointed developers seeking a rezoning of their property in order to construct a commercial development.

2. Westborough Mall v. City of Cape Girardeau, 532 F.Supp. 284 (E.D. Mo. 1981) (damages claimed $60,000,000.00). Suit brought by disgruntled developers denied a change in zoning to construct a shopping mall. Held--State action immunity extended to decision of city and city council where hearing on zoning change occurred before open legislative body.

3. Miracle Mile v. City of Rochester, 617 F.2d 18 (2d Cir. 1980) (damages claimed $16,400,000). Action brought by developers alleging that the city's petitioning of state and federal agencies in order to insure that the developers complied with applicable environmental regulations constituted a violation of antitrust laws. Held--Actions were immunized from suit under Noerr-Pennington doctrine providing broad antitrust immunity for defendants who have invoked administrative and judicial processes irrespective of anticompetitive intent.

4. *Richmond Hilton v. City of Richmond*, C.A. No. 81-1100R (E.D. Va. 1980); *Canal Square v. City of Richmond*, C.A. No. 81-1115 (E.D. Va. 1981) (damages unspecified). Suits by developers alleging zoning laws were utilized in an anticompetitive manner in order to promote development in a redevelopment area.

5. *Cedar Riverside v. U.S.*, 459 F.Supp. 1290 (D. Minn. 1978), *aff'd*, 606 F.2d 254 (8th Cir. 1979). Action brought challenging actions of redevelopment agency. District Court found state action immunity for city, its housing redevelopment authority and others charged with conspiracy to prevent plaintiffs from effectively participating in redevelopment project. Court held that state statutory scheme, viewed as a whole, "contemplates" anticompetitive activities in redevelopment area. (Note: No substantive violation found, and decision affirmed by 8th Circuit on other grounds on appeal.)

6. *Aspen Post v. Board of County Commissioners*, No. 81-1400 (D. Colo. 1981) (damages claimed $45,000,000). Suit alleging that various actions taken by municipal officials to limit development violated antitrust laws.

7. *Jonnet Development v. City of Pittsburgh*, C.A. No. 81-421 (W.D. Pa. 1981), appealed to 3rd Cir. Court of Appeals, No. 81-2182. Antitrust suit brought challenging public acquisition of a property for subsequent conveyance to third party in order to promote the redevelopment of the downtown area of Pittsburgh, Pennsylvania.

8. *Whitworth v. Perkins*, 559 F.2d 378 (5th Cir. 1977), *vacated and remanded sub nom.* *City of Impact v. Whitworth*, 435 U.S. 992, *reinstated on remand*, 576 F.2d 696 (1978), *cert. denied*, 440 U.S. 911 (1979). On state action immunity grounds, District Court granted summary judgment for defendant city, six aldermen and three private corps charged with conspiring (by means of enacting and enforcing zoning ordinance prohibiting sale of alcohol on residential property) to prevent plaintiff from competing in sale of alcoholic beverages. Fifth Cir. reversed, holding immunity inapplicable where central fact question was whether ordinance was part of conspiracy to exclude plaintiff from liquor business (*i.e.*, statute conferring zoning authority did not "contemplate" anticompetitive use of that power). After Supreme Court's ultimate denial of *cert.*, no further proceedings reported, so presumably case settled. (Note: No substantive violation ever actually found.)

9. *Stauffer v. Town of Grand Lake*, 1981-1 Trade Cas. ¶ 64,029 (D. Colo. Oct. 9, 1980), *appeal docketed*, No. 80-2332 (10th Cir. Dec. 19, 1980). District Court found state action immunity inapplicable to town, its trustees, and municipal zoning commissioners in antitrust suit alleging they had rezoned plaintiff's land in order to promote their own positions as owners of competing property which would thereby become more valuable. Court held state zoning statutes do not "contemplate" use of zoning power in such alleged anticompetitive fashion. Interlocutory appeal on state action immunity now pending before 10th Cir. (Note: No substantive liability has been found. Subsequent district court opinion held that trustees and zoning commissioners could not be found *personally* liable for damages.)

10. *Mason City Center Associates v. City of Mason City*, 468 F.Supp. 737 (N.D. Iowa 1979), *aff'd in part, rev'd in part*, 671 F.2d 1146 (8th Cir. 1982). City's 1943 comprehensive land use plan urged development of compact central business district and "suggested" no regional shopping centers be constructed on edge of city. In 1970's, at approximately same time, city planned downtown redevelopment project and entered into agreements with private developers. Competing developers sought to have agricultural land located on city's outer edge rezoned for commercial use. When rezoning refused, two of latter developers filed antitrust action against city and several of former developers, based on language in city's agreements for downtown development. At trial, council members testified that refusal to rezone was not based on agreement with downtown developers, but due to their views that downtown development should be favored over suburban development. Held--District Court found state action immunity inapplicable to city, members of city council and two corps charged with conspiring to exclude competing shopping center development. Court held state statute conferring zoning powers did not "contemplate" use of such power in anticompetitive fashion, and no "active state supervision" exists. Upon trial by jury, no antitrust violation found. Jury's antitrust determination upheld by 8th Cir. on appeal, through jury's award of damages to city on its "tortious interference" counterclaim set aside as "speculative."

Licenses and Concessions

1. *Cincinnati Riverfront v. City of Cincinnati*, C.A. No. C-1-82-128 (S.D. Ohio) (damages claimed $1,000,000.00).

Action by disgruntled bidder for right to operate a parking facility at a municipally owned sports complex.

2. *Kurek v. Park District of Peoria*, 557 F.2d 580 (7th Cir. 1977), reinstated 583 F.2d 378 (7th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979). Held--On state action immunity grounds, District Court dismissed antitrust claim by former golf course pro shop concessionaires against city park district, its board of trustees, and current concessionaire charging price-fixing conspiracy relative to retail prices at pro shop. Seventh Cir. reversed, holding city park district had no state mandate or authority to engage in (*i.e.*, statutory authority to contact/lease did not "contemplate") anticompetitive activities alleged. After Supreme Court's ultimate denial of *cert.*, no further proceedings reported; case settled. (Note: No substantive violation ever actually found.)

Liquor

1. *Grendel's Den, Inc. v. Goodwin*, 662 F.2d 88, *rev'd on reh'g on other grounds*, 662 F.2d 102 (1st Cir. 1981), appeal pending, 102 S.Ct. 996, challenged constitutionality of state statute governing issuance of liquor licenses.

Mass Transit

1. *Crocker v. Padnos*, 483 F.Supp. 229 (D. Mass. 1980) (damages claimed $1,500,000.00). Suit brought challenging the operation of a municipal transit authority. Claim concerning alleged conspiracy in award of contracts dismissed where such claim was directed to conduct engaged in as act of government by state sovereign or by its subdivisions, pursuant to state policy.

Towing Services

1. *Sherrer v. City of Huntington Beach*, No. CV-80-826-MML (C.D. Cal. 1981). Action brought challenging the city's refusal to put a company on its list of eligible companies for police-directed towing services.

2. *Shurtleff v. San Jose*, No. C-81-2717 (N.D. Cal. 1981) (damages claimed $1,000,000.00). Antitrust suit brought challenging refusal to include a towing company on the city's rotation list for city-directed towing.

3. *Kendrick v. Augusta, Georgia*, C.A. No. 179-266 (S.D.

Ga. 1981). Losing bidder for contract to tow abandoned cars from city streets brought suit, challenging award of contract to successful bidder. Summary judgment for defendant--No substantial impact on interstate commerce, and no concerted action in restraint of trade.

Utility Services

1. Morrow v. Mrs. South, Civ. No. C-3-81-197 (S.D. Oh.). Antitrust action brought against city concerning the termination of services for nonpayment of utility bill. The city does not own the utility, but is the franchisor.

2. City of Gainesville v. Florida Power, 488 F.Supp. 1258 (S.D. Fla. 1980). Antitrust suit brought by utility alleging violations of Sherman Act by a consortium of municipalities. Held--Counterclaim failed on its face for two reasons: (1) it is entirely conclusory; and (2) the allegation includes conduct immunized by Noerr-Pennington.

3. City of Groton v. Connecticut Light, 497 F.Supp. 1040 (D. Del. 1980). Counterclaim brought alleging that a consortium of cities negotiating for lower rates with the utility violated antitrust laws. Dismissed--No anticompetitive conduct. Issue of immunity not addressed.

4. City of Newark v. Delmarva, 497 F.Supp. 323 (D. Del. 1980). Suit alleging that municipal parties sued and brought administrative action in violation of antitrust laws. Counterclaims dismissed for lack of specific allegations which would provide a basis for inferring that activities of municipalities had been any other than bona fide attempts to secure governmental relief.

5. Grayson Electric Co. v. Sacramento Municipal Utility District, 526 F.Supp. 276 (E.D. Cal. 1981) (elec.). Antitrust action was filed against municipal utility district. Held--The municipal utility district, a political subdivision of the state, was not entitled to immunity, because the state did not enjoy sufficient degree of involvement in decision-making process.

Waste Collection and Disposal

1. Hybud Equipment v. Akron, 654 F.2d 1187 (6th Cir. 1981), remanded in light of Boulder, 456 U.S. ____ (1982). Antitrust action brought contesting munici-

pal ownership and operation of a waste treatment-energy recycling facility. Held--City exempt from Sherman Act.

2. *Central Iowa Refuse v. Des Moines*, No. 79-32-1 (S.D. Ia.). Action brought challenging a municipal cooperative requirement that all solid waste be brought to municipal landfill.

Water and Sewage Systems

1. *Community Builders v. City of Phoenix*, 652 F.2d 823 (9th Cir. 1981) (damages claimed $1,536,000.00). Antitrust action brought to challenge hookup fees for provision of municipal water service outside municipal boundaries. Held--City's conduct was exempt from antitrust laws in view of Arizona's policy prohibiting competition among water providers.

2. *Tuld v. City of Scottsdale and City of Phoenix*, 665 F.2d 1054 (9th Cir. 1981) ($750,000.00). Suit brought challenging municipal charges for water hookup.

3. *Schrader v. Horton*, 626 F.2d 1163 (4th Cir. 1980), *aff'g* 471 F.Supp. 1236 (W.D. Va. 1979). Antitrust suit challenging compulsory hookup with municipal water system. Held--County was immune. State policy to provide a monopoly public service clearly stated in statutes.

4. *Howland Township v. City of Warren*, C.A. No. 81-954 (N.D. Oh. 1981) (damages claimed $1,890,000.00). Antitrust action brought challenging a municipal policy of providing water only to municipal residents. City policy of only providing water to city residents attached as monopoly of local tax revenues by forcing annexations of developing property.

5. *Hallie, et al. v. Eau Claire*, No. 80-C-527 (W.D. Wisc.). Cities sue because Eau Claire decided not to extend sewer service beyond city limits. No damages.

6. *City of Norfolk v. City of Suffolk*, (E.D. Va.). Water use permit granted by one city to another; when changes denied, suit filed.

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Draft Report

COMMITTEE ON LOCAL GOVERNMENT

Senate Joint Resolution No. 19 assigned to the Committee on Local Government the following two interim studies:

1. A study of the immunity of political subdivisions from federal antitrust laws with regard to the following issues:

   -- basic state law governing the organization and powers of local government;

   -- current federal antitrust law and related court decisions which are directly applicable to the question of antitrust liability of local units of state government;

   -- the potential exposure of state political subdivisions to antitrust penalties;

   -- the requisites of what constitutes clearly articulated and affirmatively expressed state policy authorizing local governments to engage in specific anticompetitive actions and what constitutes active state supervision of such local government actions; and

   -- the regulation of cable television and an examination of whether cable television should be classified as a public utility.

2. The investment authority of units of local government involving the preparation of a proposal revising and updating the Colorado

statutes concerning such investment authority.

The first portion of the report will be devoted to the local government antitrust immunity issue and the latter part to local government investment authority.

LOCAL GOVERNMENT ANTITRUST IMMUNITY

During its meetings, the committee focused if and on how antitrust immunity could be granted to the state's political subdivisions; the advisability of such a grant; and the resulting effect of the state's extension of its immunity to local government entities. To this end, the committee solicited the views of private industry, local government representatives, and interested citizens. A brief description of the pertinent federal antitrust laws and an overview of relevant United States Supreme Court decisions precedes a discussion of committee findings and recommendations.

Federal Antitrust Laws

Sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C. §1, *et seq.*) and section 4 and 16 of the Clayton Act (15 U.S.C. §12, *et seq.*) were commonly cited as those portions of the antitrust laws most likely to apply to local government entities.

Section 1 of the Sherman Act prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce...." Price-fixing agreements, agreements to divide markets or to allocate customers, tying arrangements (the purchase of one commodity is dependent on the purchase of another), and unreasonable exclusive dealing are examples of activities which have been found to be *per se* illegal under section 1 of the act. Section 2 of the Sherman Act outlaws monopolies, attempts to monopolize, or conspiracies to monopolize.

The provision for awarding treble damages is found in section 4 of the Clayton Act (15 U.S.C. §15). The law states that:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.... (emphasis added)

Finally, section 16 of the Clayton Act (15 U.S.C. §26) permits persons to sue for injunctive relief against a threatened loss or damage by a violation of the antitrust laws.

United States Supreme Court Decisions

In the last forty years a body of case law has evolved setting forth criteria which would enable states and local governments to claim immunity from federal antitrust laws. The most recent Supreme Court decision on this topic involved a Colorado municipality and was apparently the cause of much concern among public officials of local government entities in this state and nationwide. However, the decision of the Court in the case of Community Communications Company, Inc. v. City of Boulder was based on several prior rulings of the Court regarding the applicability of the federal antitrust laws to the states and units of local government.

The first relevant landmark case regarding immunity from antitrust laws was *Parker v. Brown*, 317 U.S. 341 (1943) wherein the question was addressed whether the federal antitrust laws prohibited a state, in the exercise of its sovereign powers, from imposing certain anticompetitive restraints. The U.S. Supreme Court found that the program in question "derived its authority and efficacy from the legislative command of the state and was not intended to operate or become effective without that command." Thus, the "state action" exemption to the antitrust laws was enunciated based on the independent sovereignty afforded states in our federal system of government. The Court's reluctance to extend complete immunity to subordinate state governmental bodies is the basis of the present controversy. However, certain requirements for immunity have been developed by the Supreme Court which, when present, enable political subdivisions to claim an exemption under the *Parker* doctrine.

Action of the state itself. Enunciated originally in *Parker v. Brown*, this requisite was first applied to the activities of subordinate governmental units in *City of Lafayette, La. v. Louisiana Power and Light Co.*, 435 U.S. 389 (1978). In that instance the Court concluded that the *Parker* doctrine would exempt "anticompetitive conduct engaged in as an act of government by the state as sovereign or by its subdivisions pursuant to state policy to displace competition with regulation or monopoly public service." Again in *Boulder*, the Court found that a political subdivision is immune from application of the antitrust laws if its activity "constitutes the action of the State of Colorado itself in its sovereign capacity...". This standard implies that the local government unit must be acting as a state department or agency with minimal autonomy or discretion in order to qualify for immunity.

"Clearly articulated and affirmatively expressed" state policy. This requirement stems from *Lafayette* and was emphasized again in the *Boulder* decision. This criterion indicates that state policy must go beyond mere neutrality and show that the legislature has contemplated the enactment of an anticompetitive regulatory program. That is, the state must affirmatively address the subject. The Court in *Boulder* found that a statutory structure wherein one city could choose free-market competition in cable television while another could choose monopoly service did not satisfy the requirement of a clear state policy to displace competition.

Active state supervision. The Court, in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), emphasized the requirement that conduct qualifying for state action immunity must be actively supervised by the state. In *Midcal*, the Court rejected a claim of state action immunity because, although a clearly articulated state policy existed, there was no active state supervision. Activity in violation of the antitrust laws cannot be immunized by "a gauzy cloak of state involvement." *Id.* at 106. The Court in *Boulder* did not resolve whether this requirement was necessary for municipal immunity since the clear articulation standard was not met.

Therefore, although units of local government are not automatically exempt from the operation of the antitrust laws, not all anticompetitive activities would necessarily be subject to antitrust restraints. Anticompetitive conduct engaged in as an act of government by the state as sovereign or by its political subdivisions pursuant to clearly articulated and affirmatively expressed state policy to displace competition with corresponding active state supervision would be exempted under the Parker doctrine.

Committee Activities

In addition to presentations concerning statutory law and case law, considerable testimony was presented concerning regulatory activities of local governments which are potential areas of exposure with respect to antitrust suit.

Areas of potential liability. In testimony before the committee representatives of local government entities indicated that nationwide antitrust exposure now extends into areas of cable television franchising, solid waste disposal, energy recycling, water supply, zoning to permit or restrict residential or commercial development, taxicab franchises at public airports, the supply of aircraft fuel at air terminals, concession rights at airports, public markets, recreational facilities, ambulance service, municipal hospital services, certification of physicians at public hospitals, police tow car operations, cemetery grave markers, transit service, business licensing, operation of municipal civic centers and auditoriums, and others. Four local governments in Colorado have recently been or are presently involved in litigation for alleged violations of the federal antitrust laws -- Pitkin County/Aspen (zoning), Grand Lake (zoning), City of Boulder (cable television franchising), and the City of Pueblo (fixed based operators at the municipal airport). Testimony was contradictory as to the potential future incidence of suits as a result of Boulder.

Financial exposure. It was agreed by all parties that the costs associated with antitrust litigation are high to both sides. In addition to attorney fees and court costs, persons adjudged to have suffered injury are awarded treble damages. It was pointed out that to date there has not been a damage award levied against a municipality. Local government representatives noted that ultimately the taxpayers must pay the cost of litigation; if damages are awarded the impact on local government budgets would be disastrous. Persons representing private industry asserted that consumers inevitably pay the cost of antitrust violations in higher prices, whether the anticompetitive activity is conducted by private companies or governments.

Cable television. The committee basically discussed the cable television issue in the context of antitrust immunity for local governments since cable television franchising is an increasing source of antitrust suits. The committee adopted a resolution requesting the Legislative Council to vest in the committee the power to subpoena witnesses and documents for the purposes of investigating the Denver cable television franchise award. The Legislative Council rejected this request. Testimony was also presented in support of and in opposition to the regulation of cable television systems. The committee did not decide whether cable television should be classified as a public utility.

Legislation introduced during 1982 session. Three bills -- House Bills 1176, 1238, and 1258 -- concerning the exemption of local governments from antitrust liability were introduced during the 1982 legislative session. All of the bills were postponed indefinitely.

Arguments Against

The committee heard a number of arguments in opposition to legislation immunizing local government entities from the operation of the federal antitrust laws. These arguments as set forth herein address both the concept of a broad-based or "I dub thee immune" bill and legislation which would immunize specific regulatory activities of local governments.

1. The antitrust laws establish a national policy favoring free competition in the marketplace. The importance of this policy has been repeatedly emphasized by the judiciary. For example, in *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), the Court stated:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete -- to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.

Application of the antitrust laws to political subdivisions can be viewed as a step in furtherance of national policy. It is likely that antitrust laws will be applied only to those local government activities which do not relate to legitimate police power objectives and which directly suppress competition in the economic sphere.

Competition in the economic arena is generally [illegible] to consumers as it provides an efficient means for allocating resources and encourages new competitors and entrepreneurial innovation. Application of the antitrust laws to local government entities may initiate deregulatory policies throughout the economy.

2. Broad-based legislation which generally grants immunity for the activities of subordinate governmental units would not meet the requisites set forth by the Supreme Court and, therefore, would be ineffectual. In order for an activity to qualify for protection under the "state action" doctrine, there must exist a clearly articulated and affirmatively expressed state policy to displace competition with regulation or monopoly public service. Such policy must be actively supervised by the state. Also, the state policy must direct or authorize governmental units to engage in specific anticompetitive actions.

The so-called "I dub thee immune" legislation would do nothing more than declare that certain regulatory activities are immune or are authorized. Because this type of legislation would establish no comprehensive regulatory or monopoly public service program of the state in each particular area authorized, the criterion for active state supervision would not be met.

3. Any action taken by the General Assembly at this time would be precipitous in light of the questions left unanswered by the Court. For example, the Court has never addressed the issue of what constitutes active state supervision when a suit involves a subordinate governmental entity. The courts must be given time to refine their prior decisions so that the areas of vulnerability are

better defined.

4. In order to meet the criteria enunciated by the Court, the immunization of local government entities would require the implementation of comprehensive state programs and an expansion of the state bureaucracy. Local governments would in effect, surrender their autonomy in many areas to the state. Any law which would meet the requirements set forth by the Court may alter the structure of government in Colorado unnecessarily.

5. A legislative grant of immunity could act to protect abuses by public officials.

6. Recourse to suit under the federal antitrust laws provides a reasonable and necessary mechanism in order to compensate aggrieved parties for the damage caused by isolated instances of unreasonable conduct taken by local government officials under the auspices of police powers. While other remedies do exist, they are inadequate to provide full compensation and should be viewed as complementary to the antitrust laws rather than as superseding them.

Arguments For

The committee also heard testimony advocating the protection of local governments from the federal antitrust laws.

1. Local government entities are not necessarily similar to private enterprise and should not be treated as such. Political subdivisions of the state are empowered by the state with specific statutory and constitutional regulatory authorities. These regulatory activities are reasonable types of activity for local governments to

engage in. The legislature should protect, through immunization, those specific activities which the state has given statutory entities the power to undertake. Public officials should have the ability to act and not be paralyzed by fear of antitrust suit.

2. Recourse to suit for violations of the antitrust laws is not the only remedy available to aggrieved parties. Other remedies such as recall, malfeasance suits, and violation of due process actions do exist.

3. Persons testifying in opposition to legislation have indicated that the courts will be flexible in applying the rule of reason to cases involving local governments. However, the rule of reason addresses the effect of an activity on competition. Thus far, only economic conditions have been relevant. The regulatory efforts of political subdivisions are often undertaken in the interests of protecting the public health, safety and welfare, factors which are not guaranteed to be taken into account in the rule of reason.

4. Cases involving violations of the federal antitrust laws are tried in federal court. Without action by the state the federal courts will determine what are proper local regulatory activities in Colorado. Abdication to the courts is not an efficient way to govern.

5. The expense of antitrust litigation is prohibitive to local governments; few local government budgets have the financial resources available to defend such suits. A treble damage award levied against a local community could have disastrous effects. Ultimately the cost of antitrust litigation will be passed on to the taxpayers. Because political subdivisions fear expensive court battles, antitrust suit could be used by private industry as a sword aimed at local

governments to achieve favorable settlement.

6. The General Assembly should enact broad legislation immunizing local governments regardless of the specific criteria delineated by the Court. Such legislation would dispel the state's "neutrality" as discussed in the Boulder decision. Also, the burden of proving a locality's activities are not protected by the state would shift to the plaintiffs in any suits for alleged violations of the federal antitrust laws.

Committee Findings -- Draft A

After reviewing the testimony of the various local government and private industry representatives, a _________ of committee members agreed that legislation immunizing local government entities from liability arising under the federal antitrust laws is not advisable. In arriving at this conclusion the committee weighed both the arguments supporting and opposing immunization and concluded that the arguments against legislation were considerable and persuasive.

Committee Findings -- Draft B

A _________ of committee members concluded that it is appropriate for this state to protect local government regulatory activities through immunization since the authority to conduct those activities is delegated by the state.

EXHIBIT C

A Bill to amend and reenact § 15.1-23.1 of the Code of Virginia, relating to the licensing and regulation of community antenna television systems.

Be it enacted by the General Assembly of Virginia:

1. That § 15.1-23.1 of the Code of Virginia is amended and reenacted as follows:

§ 15.1-23.1. Licensing, etc., and regulation of community antenna television systems.-The words "community antenna television system" as used in this section shall mean any facility which is operated to perform for hire, either in whole or in part, the service of receiving, amplifying, modifying or originating television, radio or other electrical signals for the purpose of transmitting or distributing such signals by wire, cable or other means to subscribing members of the public, except that such definition shall not include (1) any system which serves fewer than twenty subscribers or (2) any system which serves only the residents of one or more contiguous apartment dwellings under common ownership, control or management, and commercial establishments located on the premises of such dwellings.

The governing body of any county, city or town may grant a license, or franchise, or issue a certificate of public convenience and necessity to no more than one community antenna television system, and impose a tax thereon~~;~~. The governing body shall have the authority to award additional licenses, franchises or certificates of public convenience as it deems appropriate, if such governing body finds that the public welfare will be enhanced by such awards after a public hearing at which testimony is heard concerning the economic consideration, the impact on private property rights, the impact on public convenience, the public need and potential benefit, and such other factors as are relevant.

It may regulate such systems, including the establishment of fees and rates, and assignment of channels for public use and operate such channels assigned for public use, or provide for such regulation and operation by such agents as the governing body may direct. In exercising the powers granted in this section, the governing body shall conform to minimum standards with respect to the licensing, franchising or the granting of certificates of convenience and necessity for community antenna television systems and to the use of channels set aside for general and educational use which shall be adopted by the Virginia Public Telecommunications Board; such minimum standards being for the purpose of assuring the capability of developing a statewide general educational telecommunications network or networks; provided, however, that the owner or operator of any community antenna television system shall not be required to pay the cost of interconnecting such community antenna television systems between political subdivisions.

2. That an emergency exists and this act is in force from its passage.

Signed by Governor Charles Robb 4/11/82

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
June 1983

SUPPLEMENTAL REPORT OF THE ANTITRUST SUBCOMMITTEE TO STUDY LOCAL GOVERNMENTAL IMMUNITY

I. Introduction.

This subcommittee previously issued a report reviewing the state action doctrine applied in federal antitrust cases. That report summarized Supreme Court cases, focusing on the *Boulder* 1/ and *Lafayette* 2/ decisions. The policies underlying application of the state action doctrine to municipalities were discussed, and various legislative proposals were considered in that report.

Several opinions have been issued by federal appellate courts since the last report of this subcommittee. Because these opinions add significantly to the development of state action rules for local governmental units, they are summarized in this memorandum.

II. Federal Appellate Cases Analyzed.

Lafayette and *Boulder*, taken together, do not fully articulate a test for determining when local action is protected from scrutiny under the federal antitrust laws. *Boulder* recognized the general rule stated in *California Retail Liquor Dealers Association v. Midcal Aluminum*, 445 U.S. 97 (1980): "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the state itself."

1/ *Community Communications Company, Inc., et al. v. City of Boulder*, 455 U.S. 40 (1982).

2/ *City of Lafayette v. Lousiana Power and Light Company*, 435 U.S. 389 (1978).

Midcal, 445 U.S. 97, 105. Because the first prong of the Midcal test was not satisfied by the City of Boulder, the court did not reach the "active supervision" issue. Boulder, 455 U.S. 40, 51. Thus, Boulder left the lower federal courts without a complete test for analyzing local action. Particularly disturbing to the cities was the issue of active supervision.

In Town of Hallie v. City of Eau Claire, _____ F.2d ______ 1983-1 Trade Cases (CCH) 65,227, (7th Cir. 1983), the court provided a considerable degree of protection for traditional governmental functions. In that case, the Town of Hallie and three other Wisconsin Townships alleged that the City of Eau Claire had violated Section One of the Sherman Act by using its monopoly over sewage treatment service to gain a monopoly in the markets for sewage collection and transportation. The city refused to supply sewage treatment service to the towns unless the towns would agree to be annexed by the city, and as a result obtain sewage collection and transportation service from the city. The district court dismissed the antitrust claim under the Parker v. Brown state action doctrine. 1982-1 Trade Cases (CCH) 64,474 (W.D. Wis. 1982).

On appeal, the parties framed the issue with clarity:

> The towns contend that the city's conduct is exempt from the Sherman Act only if it is in furtherance of clearly articulated and affirmatively expressed state policy and it is actively supervised by the State of Wisconsin. The towns contend that state action immunity is unavailable to the city because it has met neither of these two requirements. The city contends that its denial of services to the towns is authorized by clearly articulated state policy and that state action immunity protects its conduct.

1983-1 Trade Cases (CCH) ¶ 65,227 at 69,334. Judge Wisdom focused carefully on the distinctions between state action, local government action, and private action. In the court's view, private action, to be exempt from antitrust scrutiny, must meet Midcal's two-pronged test. Like private action, local government action must satisfy the first prong of Midcal, but the conduct need not be compelled by the legislature. Citing Lafayette, the court additionally held that the state legislature must contemplate the kind of local action complained of: "If the state authorizes certain conduct, we can infer that it condones the anticompetitive effect that is a reasonable or foreseeable consequence of engaging in the authorized activity." Id. at 69,337. Turning to the question of active supervision, the Seventh Circuit decided that the requirement should not be applied to municipalities:

> This case involves a local government performing a traditional municipal function. Supervision is unnecessary because local governments operate pursuant to clearly articulated and affirmatively expressed restraints imposed by the state in its policies and delegation of authority. If the conduct of local government in providing municipal services is authorized by the state and is clearly articulated and affirmatively expressed as state policy, the activity is state action and entitled to immunity even though state supervision does not exist.

Id. at 69,339. The holding of Town of Hallie is not unlimited. In a closing caveat, the court noted that the facts of the case were clear. Statutory authority for the city's activity was specific and the action complained of involved a traditional municipal function. In these areas of traditional activity, the Seventh Circuit reasoned that

Midcal did not contemplate an expenditure of limited state resources to supervise such functions. However, the court reserved the question "whether a municipality undertaking anticompetitive activity that falls outside the scope of a traditional governmental function must be actively supervised by the state to receive Parker v. Brown immunity." Id. at 69,339 n. 18.

The Fifth Circuit, in Affiliated Capital Corp. v. City of Houston, _____ F.2d _____; 1983-1 Trade Cases (CCH) ¶ 65,281 (5th Cir. 1983), was presented with a jury verdict in the amount of $2.1 million against the City of Houston, its mayor, and certain cable TV firms. The district court entered a judgment n.o.v. after hearing post-trial motions. The appeals court reinstated the jury verdict, and adopted the reasoning of the district court on the state action issue.

The Fifth Circuit's adoption of the trial judge's opinion raises some difficulty. The district court's opinion predated Boulder, and assumed the applicability of Midcal's two-pronged test to municipal activity. 519 F. Supp. 991, 1027 (S.D. Tx. 1981). The district court's focus, though, was upon the adequacy of the Texas legislature's "clear articulation and affirmative expression" of anticompetitive policy. As did the City of Boulder, the City of Houston relied upon the home rule provisions of the state constitution to prove the adequacy of its authorization to displace competition. As the Supreme Court did in the Boulder case, the district court rejected the city's contention.

Two important lessons may be derived from Affiliated Capital: (1) Like the Seventh Circuit in Town of Hallie, the Fifth Circuit has adopted the view that a city need not point to specific legislative authority for the activity complained of. Relying on Lafayette, the Affliated Capital court echoed the view that "an adequate state mandate for anticompetitive activities of cities... exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.'" 519 F. Supp. at 1027 (citing Lafayette). (2) Where the actions of governmental officials encourage or promote an anticompetitive scheme, the courts will not blind themselves to the facts of the case. The Fifth Circuit recognized that Parker v. Brown reserved the possibility of applying the antitrust laws to a governmental entity which is alleged or proven to be a co-conspirator with private entities. 519 F. Supp. at 1024. The Fifth Circuit obviously had no reservations about exposing government or government officials to liability under appropriate circumstances.

Gold Cross Ambulance Service v. City of Kansas City, _____ F.2d _____, 1983-1 Trade Cases (CCH) ¶ 65,339 (8th Cir. 1983), involved a challenge to Kansas City's adoption of a single operator ambulance service. The district court dismissed the claim of an excluded operator on the basis of the state action doctrine. The Eighth Circuit affirmed.

The Eighth Circuit followed the decision process used by the Seventh Circuit in Town of Hallie, articulating a slightly more specific inquiry. The court rejected, as did the Seventh Circuit, the requirement of active state supervision of local conduct. _____ F.2d at _____, 1983-1 Trade Cases (CCH) ¶ 65,339 at 70,021. In regard to the expression of state policy, the Gold Cross opinion articulates a test comprised of two elements: "The legislature must have authorized the challenged activity, and it must have done so with an intent to displace competition." Id. at 70,018.

The court found ample authority for Kansas City's monopoly ambulance system in Missouri law, which allows localities to contract with one or more organizations for the operation of emergency vehicles, and extensively regulates ambulance personnel and their equipment. As to the intent of the legislature to displace competition, the court took the view that legislative intent may be inferred from the basic structure of the state's regulatory scheme: "A sufficient state policy to displace competition exists if the challenged restraint is a necessary or reasonable consequence of engaging in the authorized activity." Id. at 70,019. The court then reasoned that the Missouri legislature, by authorizing contracts with one or more firms, contemplated the possibility of a single firm performing monopoly ambulance service for an entire city.

These cases do a great deal to fill the void left by Boulder. The Fifth, Seventh, and Eighth Circuits are in agreement that the clear articulation and affirmative expression of state policy to displace competition need not mandate or compel local activity with great specificity. 3/ Instead, local conduct will be exempted where it is authorized by the state legislature and the legislature has contemplated the anticompetitive impact which may result therefrom.

Further, the Seventh and Eighth Circuits, in post-Boulder cases, have held that the active supervision criterion need not be applied to traditional local governmental action. The Hallie court expressly focuses on traditional local activities, reserving its right to examine closely conduct undertaken outside the scope of traditional governmental functions.

III. Legislation.

The Antitrust Division of the Department of Justice supports the adoption of federal legislation providing an exception from the antitrust laws for local governments. A copy of the proposed bill is attached. The subcommittee's review concluded that this draft, while apparently aimed at defining the circumstances under which local governments

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3/ In dictum, the Fifth Circuit recently reemphasized this point, arguing that state compulsion is not required of municipal defendants. Rather, the state action defense may apply where the state sanctions anticompetitive behavior. U.S. v. Southern Motor Carriers Rate Conference, Inc., _____ F.2d _____, 1983-1 Trade Cases (CCH) ¶ 65,320 at 69,890 (5th Cir. 1983).

would be given immunity, fails to do so with clarity. As a result, the cities could still be exposed to litigation arising from ambiguity in the statute as well as direct antitrust attacks. Specific examples of this include (1) failure to define "general function unit of local government," leaving many actions of component bodies of city government, such as school boards, zoning boards, open to antitrust attack; (2) failure to specifically deal with the supervision question; (3) failure to define "regulatory powers" in a manner which will give the cities adequate guidance; (4) an exclusionary clause which is ambiguous in its application; and (5) unclear in the manner and extent federal case law is to be applied to local government action. A majority of the subcommittee believes that federal legislation clearly embodying the standards for immunity recently enunciated by the circuit courts as discussed above may be acceptable and beneficial to cities in conducting their affairs, however, the subcommittee believes the proposed draft presently under consideration will not accomplish that goal and is not acceptable.

Based on the above, the subcommittee submits the following proposed resolution for consideration.

98th CONGRESS
1st SESSION

S.______

IN THE SENATE OF THE UNITED STATES

Mr.______________________________ introduced the following bill; which was read twice and referred to the Committee on______________________

A BILL

To clarify the application of the Federal antitrust laws to local governments.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Local Government Antitrust Act of 1983".

Sec. 2. The Federal antitrust laws shall not apply to any law or other action of, or official action directed by, a city, village, town, township, county, or other general function unit of local government in the exercise of its regulatory powers, including but not limited to zoning, franchising, licensing, and the establishment of monopoly public services, but excluding any activity involving the sale of goods or services by the unit of local government in competition with private persons, where such law or action is valid under State law, except to the extent that the Federal antitrust laws would apply to a similar law or action of, or official action direct by, a State. For purposes of this section, the term "Federal antitrust laws" means the antitrust laws, as such term is defined in the first section of the Clayton Act (15 U.S.C. 12), and section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

PROPOSED RESOLUTION

WHEREAS, the National Association of Attorneys General at its Summer 1982 meeting created by resolution a subcommittee to study the impact of the decision of the United States Supreme Court in Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982), regarding local government liability for violations of the federal antitrust laws; and

WHEREAS, at the Winter 1982 meeting, the Association accepted the subcommittee's written report and instructed the subcommittee to recommend a position for the Association's consideration when appropriate; and

WHEREAS, the Association has reviewed the development in the circuit courts of appeal of standards for state action immunity of local governments from the antitrust laws which has occurred since the 1982 Winter meeting; and

WHEREAS, under these standards:

(1) there must be proper state legislative authorization for the local government conduct in question;

(2) the challenged anticompetitive effect of the conduct must be a necessary or reasonable consequence of engaging in the authorized conduct;

(3) the challenged conduct need not be mandated by the state legislation but need only be authorized;

(4) state supervision of the local government activity is not required; and

(5) statutory compulsion and state supervision of the anticompetitive conduct is only necessary if private parties are acting pursuant to a state mandate; and

WHEREAS, the Association has received proposed legislation supported by the Antitrust Division of the Justice Department, which attempts to incorporate some of the above standards into a statutory exemption from federal antitrust liability; and

WHEREAS, review of the proposed legislation indicates significant areas of ambiguity and confusion regarding the proper application of such legislation; and

WHEREAS, the Association believes the enactment of the proposed legislation as presently drafted would not provide local governments with any definitive guidance regarding their exposure to antitrust liability and would spawn additional litigation aimed at interpretation of the statute itself; and

WHEREAS, the Association believes local governments are entitled to some indication of the circumstances in which their actions would be immune from, or liable under, the federal antitrust laws;

NOW, THEREFORE, BE IT RESOLVED, that the National Association of Attorneys General believe the evolving judicial standards of the federal circuit courts of appeal to date provide guidance to local governments and recognize a need for a reasonable balancing of governmental and economic competitive interests; and

BE IT FURTHER RESOLVED, that federal legislation which clearly embodies these standards may provide appropriate guidelines for local governments; however, the proposed legislation currently supported by the Antitrust Division of the Justice Department fails to clearly reflect such standards and fails to provide adequate guidelines to local governments; and

BE IT FURTHER RESOLVED, that the General Counsel of this Association is authorized to transmit these views to Congress, the Administration, and other appropriate individuals.

The CHAIRMAN. Around this place, I know since I have been here for some 30 years, they want to put off, continue, put off, continue, and you never get anything done. I like to do things and get through with them. That makes sense, does it not? If they want to submit any other statements, we would be glad to have them.

Mr. EGGERT. Earlier there had been testimony given here about nonelected officials. I would like to speak on behalf of airport authorities because that is all I know about, but I would like for you to know, Mr. Chairman, that the airport authorities, the authorities that operate airports are very responsible, special districts, so to speak, and I wanted to quickly outline in 30 seconds what we have to do as airport authorities, the same as any elected officials.

Most of us have elected officials. There are two elected officials on my board. All have open public meetings. They are subject to the sunshine laws. They are subject to conflict of interest laws. Their funds are public funds. They are subject to public audit. Their records are subject to audit. They are given police powers. They have the power of eminent domain. They issue tax exempt revenue bonds. Their activities are declared by statute to be governmental functions exercised for public purposes and matters of public necessity. And I submit they are therefore responsive and responsible public officials.

The CHAIRMAN. Thank you.

If there is nothing else, we stand adjourned.

[Whereupon, at 3:37 p.m., the committee adjourned, subject to the call of the Chair.]

APPENDIX

Additional Statements and Views

April 24, 1984

Municipal antitrust liability is not something we sit around Graham, North Carolina discussing throughout the day, not the topic of every ladies tea or businessmen's meeting, but it is something of primary interest to me as a citizen of Graham and as an elected official. The thought that our quiet town of about 8,000 could be bankrupt in this way is very unsettling.

As a city council we are elected to manage the affairs of the the town, including providing all the traditional municipal services. Yet the application of federal antitrust action against my town, legislation not applied to federal or state governments, is a tool that can be used against us as we try to fairly administer city business.

If a judge should reach a different decision on a zoning application than the one reached by the duly-elected city council, then a developer can sue us into financial oblivion unless we get some relief in the form of immunity. Armed with a judge's order, the developer can not only reverse a zoning ruling, but collect compensation, in fact, collecting treble damages as the law now reads and is being interpreted by the courts.

We can not conduct municipal government matters decently and in order with this threat hanging over our heads.

I'm not asking for any criminal action or conflict of interest to be excused, only the routine actions of city council previously thought to be immune from antitrust liability. Judgements that dot the map already and the cases pending on court dockets across America are alarming to city servants like me.

Graham is just one of 462 cities in North Carolina and but one of 15,000 American cities who earnestly request your attention to this matter and relief from antitrust liability through federal legislation.

Walt Atkins

Walt Atkins, City Councilman
414 Ridgecrest St.
Graham, N.C. 27253

STATEMENT OF
S. KENNETH HOWARD, EXECUTIVE DIRECTOR
OF THE
UNITED STATES ADVISORY COMMISSION
ON
INTERGOVERNMENTAL RELATIONS

The Advisory Commission on Intergovernmental Relations (ACIR) is a permanent, bipartisan and independent agency created by Congress in 1959 to give continuing attention to the tensions and problems that arise in our federal form of government. Because federalism is a fluid, ever changing system of governance, the ACIR's ongoing mission is to (1) provide a forum for discussion and deliberation; (2) conduct research on intergovernmental issues; and (3) make recommendations for reform. The Commission comprises 26 members representing the executive and legislative branches of all three levels of government. Its membership includes three U.S. Senators, three members of the U.S. House of Representatives, three federal executive branch officials, four governors, four mayors, three state legislators, three county officials, and three private citizens.

Municipal antitrust is an issue of great intergovernmental concern. Local government officials are uncertain what actions they can take without fear of suit. Local units and their officials risk sustained legal actions that cost a great deal of time and money to win — and millions of dollars to lose. States may immunize certain local activities from antitrust challenges, but few states have passed such statutes thus far. None of these laws has undergone judicial scrutiny. Even if a state immunization passed judicial muster, actions that localities took prior to the statute's enactment might remain exposed to litigation. These comments simply sketch some of the dimensions of this serious intergovernmental problem.

ACIR has been following this issue for nearly two years, beginning just after the Supreme Court's landmark opinion in Community Communications Co. v. City of Boulder. ACIR's staff members have conducted basic research, held discussions with experts in the field, organized and participated in negotiations between and among state and local public interest groups, attended other meetings on this topic, and monitored other legal and political developments.

The Commission itself has wrestled with the difficulties of municipal antitrust liability at each of its last three quarterly meetings. It has concluded that this issue merits serious and immediate attention. The Commission adopted a broad policy position it felt would help guide efforts toward a solution. The policy includes two separate statements. The first gives the Commission's view as to which levels of government should act and how. The second speaks to the substance of any statutory language and covers eight separate policy concerns.

As the members of this Committee are well aware, decisionmakers are sharply divided over several facets of the proposed solutions to this problem. The most divisive question for the ACIR has consistently been which level of government should extend antitrust immunity to local governments.

A strong minority of Commission members felt that the statutes in question were adopted by Congress and are enforced in federal courts, so any changes in applying them to local governments should be done through Congressional action.

A bare majority contended that local governments are creatures of the states, not the national government, and that the substance and character of the relations between states and their local entities should be determined by the individual states, not by national legislation. This view is sustained by language in the majority opinion in Boulder indicating that "...a State may frequently choose to effect its policies through the instrumentality of its cities and towns." Therefore, it was argued, only the states should be legislatively directing the powers of localities. However, Supreme Court decisions have left unresolved a few key issues concerning how states may extend their immunity to their respective local governments in ways that will withstand judicial scrutiny. The Commission concluded, in a very close vote, that Congress should adopt legislation in this area, but only to clarify state immunizing procedures. The adopted statement reads as follows:

The Commission recommends that Congress amend federal antitrust laws to establish broad guidelines for how states may extend the present state action exemption to their local governments provided two conditions are met:

1) local governments are acting under the authority of home rule or other state laws, and
2) localities are acting within their governmental capacity.

Further, in expressing its sense of gravity the Commission "...recommends that such immunity be provided rapidly..."

Policy Framework

Although the Commission was sharply divided over who should act, it was clear as to what it thought constituted good public policy in this field. The second part of ACIR's policy statement consists of eight independent recommendations with which it believes any immunizing legislation should accord.

Degree of Local Immunity

Governments are only as immune from antitrust liablities as the courts say they are, modified, of course, by Congressional guidance. This point has been underscored by the Boulder decision. In recent years the courts have restricted both state and local immunity. States still enjoy immunity from penalties under the Eleventh Amendment to the U.S. Constitution, but they cannot extend that constitutional blanket to their local governments.

Given the legal uncertainties that already surround state and local immunities, little would be accomplished by trying to establish different degrees of immunity for these two strata of government. If such distinctions were made, they would probably only generate more legal confusion and adjudication. It is not clear what public policy objective would be served by having localities have any greater or lesser immunity than state governments. It seems most prudent simply to have both levels as equivalent as possible under the antitrust laws and court cases. If local governments were protected in undertaking any activity for which their respective states would be immune, their actions, like the states' could still be enjoined under federal antitrust laws and they would still face scrutiny and appropriate penalties under other state and federal laws. Therefore,

The Commission recommends that, within the limits imposed by inherent differences in their constitutional statutes, the immunity granted local governments should be equal to that enjoyed by state governments.

General and Special-Purpose Local Governments

Local governments include both special-purpose units and general-purpose units. The former can be found in virtually every function of government, but especially in the utility and transportation fields. Trying to establish definitive lines between these types of governments would require a lot of effort without producing commensurate public benefits. The distinctions might themselves prompt court challenges. The substantive issues and political hazards antitrust liability entails are already sufficiently great that resources should not be devoted to making distinctions which do not demarcate important differences.

Moreover, to leave special-purpose governments unprotected could render many of them useless; many of these entities were established precisely to undertake activities that could be considered anticompetitive. Continued exposure to federal antitrust laws could prove fatal to some, if not many, of these governments. Thus,

The Commission recommends that any statutory enactment affecting municipal antitrust liablity grant whatever immunity is provided to all local units of government.

Active Supervision

The Supreme Court explicitly left unresolved the question of active state supervision over allegedly anticompetitive local government acts. Lower federal court decisions — such as Town of Hallie v. City of Eau Claire and Gold Cross Ambulance v. Kansas City -- seem to be giving less and less weight to requiring state supervision. If the standard of supervision were strict or intrusive, it could limit the number of immunities sought by and granted to local governments because of the great burdens such an approach on both the supervised and the supervisor. Moreover, imposing a stringent standard would indicate little confidence in localities. The lower court decisions appear to be pointing in a direction the ACIR deems correct.

The Commission recommends that active supervision of allegedly anticompetitive local activities not be required where such activities are already subject to local supervision, in accordance with established federal or state directives, if that local supervision provides clear and fair guidelines, effective due process procedures, and ultimate decisional review by the highest local governing body.

Insufficient Immunity

Any immunity enacted by Congress or a state could later be found insufficient if challenged in court. If local governments are held fully liable after acting in good faith under an immunity later found wanting, the notion of an "immunity" would be significantly weakened. Local governments should not be held liable for a mistake made by Congress or a state. Thus,

The Commission recommends that local governments acting under a grant of immunity that is later found insufficient face neither liability claims nor damages but only be enjoined from the activity in question.

Governmental-Proprietary Distinction

Chief Justice Burger's key concurring opinion in City of Lafayette v. Louisiana Power & Light Co. raised a distinction between governmental and proprietary activites, but this approach was not taken up again in Boulder. The distinction is attractive, falling as it does between complete exposure to federal antitrust laws on the one hand and a large, almost blanket, immunity on the other. Yet extensive scholarly research and practical experience clearly suggest that this distinction is not a sound foundation for determining the extent to which federal antitrust laws should apply to municipalities. Over the years the legal system has demonstrated a profound inability to define these two terms satisfactorily. Judgments are made on a case-by-case basis, without clear and logical standards. Trying to make a distinction in statutory language may only add to the uncertainty over what is and is not protected.

Federal courts, as evidenced by the Supreme Court's decision in Jefferson County Pharmaceutical Co. v. Abbott Laboratories, are already showing a propensity to limit state and local activities that they define to be of a proprietary nature. This distinction has a clear value as an analytical tool, but compelling evidence to raise it to the level of a legal doctrine is lacking.

As shown in the Commission's initial policy statement, the Commission believes exemption should be extended at a minimum to "governmental" activities, however these may be defined judicially at any given time. Although the Commission has misgivings about writing this distinction into law, it endorses the judiciary's continued efforts to grapple with this issue as it carefully scrutinizes the more commercial proprietary activities undertaken by governments.

The Commission recommends that any statutory enactment affecting municipal antitrust liability not distinguish between proprietary and traditional or governmental functions as a basis for defining local immunity.

Codifying State Immunity

Some observers believe that the degree of existing state immunity from federal antitrust laws needs to be codified before any effective immunization can be extended to local governments. Efforts to define precisely the extent of state immunity run into two problems. First, if the Supreme Court disagrees with the new definition, any solutions relying on that definition may also be struck down. Secondly, federal antitrust law is constantly evolving, especially recently as it applies to governments of all sorts. Codifying the state action immunity in federal laws might unwisely constrain judicial evolution of the pertinent doctrine. Therefore,

The Commission recommends that any federal statutory enactment affecting municipal antitrust liability not codify the immunity of the states from federal antitrust laws.

Standards for Public and Private Action

Local officials are elected or selected to serve the public interest; private firms and individuals are neither elected nor primarily responsible for serving the public interest. Yet public officials who take allegedly anticompetitive actions in the name of the the public good, are unable to introduce this difference in intent as part of their defense against litigation brought under the federal antitrust laws. Moreover, public actions are just as liable under federal antitrust laws as private ones that make no such claim. Likewise, public officials, elected to serve public goals, are just as personally liable as private citizens when the latter are pursuing their own goals. Treating the two sectors as if they were identical ignores basic differences in the purposes that lie behind their actions.

These basic differences in make-up and purpose may also argue for treating damage awards differently if public bodies and officials are found to be violating federal antitrust laws. The threat of treble damages is likely to intimidate local officials as they undertake their responsibilities. Furthermore, potential personal liability may well discourage good and talented people from seeking public office. Other statutes -- such as civil rights, sunshine, and anti-corruption ones -- and the power of the ballot box provide ready alternatives for policing the acts of governments and their officials. It would seem sufficient in those cases where local governments or their officials are not exempt from the federal antitrust laws to cease and desist the action in question. Therefore, The Commission recommends that the standards used to determine the antitrust liability of public bodies and officials be different than those applied to private actions and individuals. The Commission further recommends that where public bodies and officials are litigants in suits under federal antitrust laws, relief should include only injunctive and declaratory steps.

Immunizing Language

It is at present unclear how specifically an activity must be stated within immunizing legislation to be protected. Broad statements which simply declare that local governments are protected in those areas where the state is immune may initially appear desireable but may well be struck down by the Supreme Court if challenged. On the other hand, listing activities singly is time consuming and can readily become overly burdensome on those seeking or granting immunity. Moreover, listing activities implies that all those not listed are intentionally left unprotected, which may not be true at all. Efforts should be made to provide some specifications but to keep them as broad as possible, using such categories, for example, as "environmental protection" and "public health" rather than "garbage collection" and "operating public health clinics." Therefore,

The Commission recommends that in stipulating activities that will be immune from federal antitrust litigation, broad categories be used rather than itemizing specific activities.

ACIR appreciates this opportunity to provide its views on this most important issue. We would be happy to provide further assistance should the Committee desire it.

STATEMENT
BY THE
AMERICAN PAPER INSTITUTE

The American Paper Institute (API) is pleased to have the opportunity to submit its views on S 1578, the "Local Government Antitrust Act of 1984." API is a national trade association whose 160 member companies produce over 90% of the country's pulp, paper and paperboard. These products are produced from both recycled and virgin fibers. It is on behalf of the recycling segment of the paper industry that we are providing these comments for the Committee's consideration.

It is important to note at the outset that API does not have a position on the basic policy question of whether or not federal legislation should be enacted to clarify the applicability of the federal antitrust laws as they pertain to local governments. Our comments are limited only to the potential impact such legislation could have on our industry, and we have tried to offer constructive changes to S 1578 that would address the problems we have identified while not undermining the fundamental intent of the legislation.

Recycling waste paper is an important industry to our economy and our communities. At present, there are approximately 600 paper and paperboard mills across the United States which depend, in varying degrees, on the supply of old newspapers, corrugated boxes, and mixed office and high grade waste paper. Over 200 of these mills depend exclusively on waste paper as their raw material. In total, recycled paper represents about 24 percent of the fiber used by the U.S. paper and paperboard industry in the manufacturing of new products.

The paper recycling industry, however, is not limited just to the manufacturers that use the fiber in waste paper as their raw material for producing new paper products. It also includes charitable and civic groups and municipalities that collect waste paper; waste paper dealers that purchase recyclable paper for subsequent resale; and haulers who collect recyclable paper from stores, office buildings, and commercial establishments. In all, over 50 million Americans participate in recycling old newspapers. In 1983, waste paper dealers and recycling mills that buy from collectors paid over $500 million for waste paper, of which about $100 million was paid to those who collect old newspapers.

The paper recycling industry's concern with S 1578 is that it could potentially lead to a significant reduction in the available supply of paper for recycling. Specifically, many local governments are currently seeking ways to monopolize the flow of municipal solid waste by enacting "flow control" ordinances which require all solid waste, including recyclable paper, to be directed to a single destination, such as a waste-to-energy plant. These ordinances can restrict or even deny recyclers access to and use of recyclable materials that may be source-separated or recovered from solid waste after collection.

The prime purpose of a flow control ordinance is to provide long-term financial viability to a waste-to-energy facility, a facility which burns solid waste to recover its energy value. Such financial viability is achieved by guaranteeing over the life of the facility a definite amount of solid waste (including recyclables), for which the facility will be paid by the municipality a certain tipping fee per ton delivered. On the output side of the waste-to-energy facility, the guaranteed volume of solid waste ensures that the facility will be able to produce for sale a certain amount of energy or materials. By guaranteeing the input and the output to the waste-to-energy facility, the flow control ordinance attempts to assure the facility long-term financial viability.

However, broadly constructed flow control ordinances represent an extreme, unnecessary and generally counter-productive method for attempting to guarantee financial stability for such projects. Among other problems, these ordinances:

1. Do not resolve the solid waste problem since they require burning waste paper that would be purchased and otherwise recycled;

2. Do not assist waste-to-energy facilities in generating significant amounts of energy, since the removal of the recyclable paper only reduces the energy generation of a facility by approximately 4 percent, an amount far less than seasonal changes;

3. Lead to the construction of excess facility capacity, thereby costing the taxpayer $65,000 to $85,000 per additional ton of daily capacity;

4. Deprive private haulers, charitable groups and individuals of a source of revenue;

5. Deplete the nation's available fiber supply; and
6. Unfairly guarantee the profits of one industry (waste-to-energy) to the detriment of another industry (paper recycling).

Enactment of S 1578 as currently drafted would immunize these ordinances from attack under the antitrust laws while also sanctioning the anticompetitive effects they would have on the ability of the recycling industry to purchase its raw material. This, in our view, would not only be unfair to the recycling industry but would also be contrary to the public interest. The issue here is not whether waste-to-energy is an effective technology for addressing the very real solid waste management problems that confront many local governments. In fact, paper recyclers recognize the need to pursue this technology as part of an effective solid waste management effort. The issue we are concerned with centers strictly on government regulation which seeks to displace legitimate and fair competition in the marketplace.

In addition to the harm S 1578 may inflict upon recycling, it will also negate decades of congressional policy that supports and fosters recycling.

In the Energy Security Act, Congress required that any waste-to-energy project receiving federal funds must assure the Secretary of the Department of Energy (DOE) that the project would not use substantial quantities of waste paper which would otherwise be recycled for use other than as a fuel. Furthermore, assurance must be given that the project will not substantially compete with facilities in existence on the date of the financial assistance which are engaged in the separation or recovery of recyclable materials from municipal waste.

The Energy Organization Act required the Secretary of DOE to place major emphasis on the development and commercialization of recycling. One of the goals of the National Energy Conservation Policy Act is to increase the use of recovered or recycled materials in industrial operations. And, one of the fundamental principles of congressional environmental policy found in the National Environmental Policy Act requires that federal actions enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

Finally, and most recently, the Resource Conservation and Recovery Act

(RCRA) has as one of its objectives the establishment of a cooperative effort among the federal, state and local governments and private enterprises in order to recover valuable materials from solid waste. HR 2867 and S 757, the RCRA reauthorization bills currently pending in Congress, specifically address the ability of recyclers to have continued access to the recyclable portion of the solid waste stream. The language, which is identical in both bills, is:

> Size of Certain Facilities
>
> Sec. 12 (a) Section 4001 of the Solid Waste Disposal Act is amended by adding the following at the end thereof: "In developing such comprehensive plans, it is the intention of this Act that in determining the size of the waste-to-energy facility, adequate provision shall be given to the present and reasonably anticipated future needs of the recycling and resource recovery interest within the area encompassed by the planning process."
>
> (b) Section 4003 of such Act is amended by adding the following new subsection (c) at the end thereof:
>
> "(c) Size of Waste-To-Energy Facilities - Notwithstanding any of the above requirements, it is the intention of this Act and the planning process developed pursuant to this Act that in determining the size of the waste-to-energy facility, adequate provision shall be given to the present and reasonably anticipated future needs of the recycling and resource recovery interest within the area encompassed by the planning process."

The thrust of this approach is to ensure that waste-to-energy facilities are not oversized, thus creating pressure upon a municipality to require that all solid waste, including recyclables, be delivered to the waste-to-energy facility.

Unfortunately, the proposed RCRA amendments are not mandatory upon the states. If such amendments pass, the respective states need to implement them only if they seek federal funding to develop solid waste plans. But, with no federal funds available for state solid waste plans, it is unlikely that many states will adopt this specific provision.

However, the need to offer protection to recyclers access to and use of their raw materials is being recognized as a sound and desirable public policy at the state level. Since the Community Communications v. City of Boulder decision, many states have reviewed certain municipal activities to determine which, if any, should have immunity from federal antitrust laws. In order to grant such immunities, the holding in Boulder required each state to clearly and affirmatively enact legislation if they chose to displace competition with monopoly public service. In particular, in the area of solid waste management (NSWMA v. City of Akron), the haulers challenged the City of Akron's broad flow control ordinance as being contrary to the antitrust laws. The U.S. Supreme Court remanded Akron for determination in accordance with its holding in Boulder. Several states have recently enacted laws, many of which have been in response to the U.S. Supreme Court's holding in Boulder, with the objective of protecting the collection systems for recyclable materials, and it is anticipated that several more will follow suit. Attached as Appendix I are examples of the language incorporated in three state statutes which illustrate this point.

For the reasons outlined above, API believes that federal legislation granting antitrust immunity to local governments should not be so broadly constructed as to jeopardize legitimate businesses such as recycling. In a June 3, 1983, letter to Chairman Strom Thurmond, API, commenting on the draft legislation subsequently introduced as S 1578, offered the following observations and specific recommendation to amend the bill:

> This latest draft legislation, in our view, would seriously jeopardize the application of federal antitrust laws to practices authorized by flow control ordinances. The one specific activity excluded from the exemption granted by the bill is that "involving the sale of goods or services by the unit of local government in competition with private persons" (lines 11 through 13). This exclusion does not appear to apply to flow control ordinances since these ordinances do not address the sale of goods by a local government. Rather, the local government generally provides authorization for the acquisition of goods (recyclable materials), the resultant effect being the displacement of competition with others.
>
> In order to revise the draft bill to address our concerns, we suggest adding three new words (underlined below) on lines 11 through 13 so that the exclusionary language would read as follows:
>
>> but excluding any activity involving the sale or acquisition of goods or services authorized by the unit of local government in competition with private persons,

> This amended language, in our view, would provide some protection to recyclers to allow them to compete in a free market for their raw materials. We are seeking no special consideration or advantage. We are merely seeking protection from anti-competitive practices that threaten the very existence of our industry.

API is anxious to work with the Members of this Committee and the Committee staff in order to make certain that legislation granting antitrust immunity to local governments would not unfairly jeopardize recyclers. The suggested amendment we have offered is, in our view, a sound approach, but we stand ready to work with the Committee to consider other alternatives to address our concerns as deliberations on this legislation continue.

We appreciate the opportunity to submit our views on this issue.

APPENDIX I

Georgia - Georgia Laws Act 1336 of 1984; to amend Chapter 63 of Title 36 of the Official Code of Georgia Annotated. Section 1. 36-63-2. (a) and (b) selected parts.

"(a) It is likewise in the public interest and is vital to the public welfare of the people of the State of Georgia and it is declared to be the intent of this chapter to preserve and do nothing to interfere with the practice of recycling solid waste for use again by industry and the public thereby preserving and reusing important natural and other resources, except as specifically provided for in this chapter."

"(b) . . . excluded from such authorization shall be any rights to materials or substances contained in such solid waste, sewage sludge, or resources contained therein as may be separated for recycling at any time prior to pick up by or delivery to such resource recovery development authority, other authority, municipal corporation, county, or other governmental body or agency or private party of such discarded solid waste, sewage sludge, or resources contained therein."

North Carolina - Chapter 795 of the North Carolina 1983 Session Laws; Section 3. G.S. 130-166 (5b).

"(5b) Authorize units of local government to require by ordinance, that all solid waste generated within the designated geographic area that is placed in the waste stream for disposal be collected, transported, stored and disposed of at a permitted solid waste management facility or facilities serving such area. The provisions of such ordinance shall not be construed to prohibit the source separation of materials from solid waste prior to collection of such waste for disposal, or prohibit collectors of solid waste from recycling materials or limit access to such materials as an incident to collection of such solid waste . . ."

Texas - Chapter 934 of the General and Special Laws of Texas 68th Legislature's Regular Session 1983, pg. 5125; Section 4, Construction of Act exemptions (a) and (b).

"(a) This Act shall not be construed to displace, prohibit, preclude or limit persons from extracting or using materials they generate or legally collect or acquire for purposes of recycling or resale."

"(b) Materials that are separated from solid waste or recovered from solid waste for reuse or recycling by the generator, by a private person under contract with the generator, or by a collector of solid waste or recovered materials are not subject to this Act."

STATEMENT BY
THE EDISON ELECTRIC INSTITUTE
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

April 24, 1984

We appreciate the opportunity to present the views of the Edison Electric Institute (EEI) on S. 1578, a bill to exempt units of local government from liability under the antitrust laws.

EEI is the association of America's investor-owned electric utility companies. The member companies of EEI serve 98 percent of all customers of the investor-owned segment of the industry. They generate approximately 76 percent of all electricity in the United States and provide service to 75 percent of all ultimate customers in the nation. Many of our companies compete directly with municipally-owned or -operated electric utilities and, as a result, we are vitally interested in the issues that are addressed by S. 1578.

This legislation would create an exemption from the antitrust laws in the exercise of their regulatory powers for all cities and other local and regional governmental subdivisions and the businesses owned and operated by them. These local governmental subdivisions, in effect, would be elevated to the status of states with respect to the antitrust laws. This would provide them with power to regulate business and create restraints of trade without regard to state policy. S. 1578 eliminates the requirement that local governments demonstrate that their actions are pursuant to a clearly articulated state policy. In so doing, the bill would overturn two decisions of the Supreme Court, City of Lafayette v. Louisiana Power & Light, 435 U.S. 389 (1978) and Community Communications Co. v. City of Boulder (1982), 455 U.S. 40 (1982), and would violate the basic principles of federalism as well as the purposes of the antitrust laws.

To assess the effect of this legislation, one should consider what its impact would have been in the Lafayette and Boulder cases. In the Lafayette case, decided by the Supreme Court in 1978, two cities sued an electric utility company for violating the antitrust laws. The utility counterclaimed, contending that the cities were violating the antitrust laws by reason of their practice of requiring persons requesting water and gas service to also purchase electric power from the city. The utility asserted that the practice of tying the sale of electricity to water and gas service constituted an illegal tie-in. The cities argued that they were immune from antitrust scrutiny by reason of their "status" as governmental entities.

The Supreme Court held that state policy, not status, was the critical element of state action immunity, and local governments such as cities and counties are not automatically immune to the antitrust laws because of their status. To be automatically immune, such entities must demonstrate that their actions are pursuant to a "clearly articulated and affirmatively expressed" state policy. The Court further found that the two localities in question were acting outside the scope of state law by reason of their practice of tying electric service to water and gas service. The case was remanded to the District Court and was settled. Absent application of the antitrust laws to local governments, the cities' practice of tying electric service to water and sewer service would have gone unchallenged.

The issue decided two years ago by the Supreme Court in the Boulder case was whether a constitutional grant of "home rule" status to a community was, in itself, a sufficiently clear articulation of state policy to create broad antitrust immunity for such governmental subdivisions and their employees. The Supreme Court decided in Boulder to treat all local governmental subdivisions on the same basis -- that home-rule status, without more, was not sufficient to insulate such a local government from all antitrust scrutiny.

These cases are of course important in considering this bill, or whether any legislation in this area is necessary or desirable. As a result of these cases, the law is that states may, if they choose, immunize localities from the operation of the Federal antitrust laws in regard to a specific subject area by a clearly articulated statement of intent to do so. In the absence of such an affirmatively expressed state policy, localities are in the same position as other entities, including private entities with which they compete; i.e., localities must obey the Federal laws implementing a national policy of free and open competition.

We believe this standard to be appropriate, since large segments of our economy are controlled or operated directly by local government subdivisions and still larger segments are directly affected by their regulatory policies. Through the years, Congress repeatedly has expressed its belief, in relation to business endeavors generally, that concentration of economic power is undesirable and that free competitive markets provide the best means of achieving maximum benefits to consumers through delivery of the highest quality goods and services at the lowest possible prices. While the law as to application of the antitrust laws to the pervasively-regulated electric utility industry is still evolving, it is certain that, whatever application finally may be determined by the courts and/or Congress, it should be the same as to all segments of the industry; i.e., to electric utilities whether investor-, cooperatively- or municipally-owned and operated.

Chief Justice Berger in his concurring opinion in Lafayette responded to one argument often advanced on this subject, that local governments acting for the public welfare should not be subject to attack under the antitrust laws, as follows:

> It strikes me as somewhat remarkable to suggest that the same Congress which 'meant to deal comprehensively and effectively with the evils

> resulting from contracts, combinations and conspiracies in restraint of trade' . . . would have allowed these petitioners to complain of such economic damage while baldly asserting that any similar harms they might unleash upon competitors or the economy are absolutely beyond the purview of federal law. (435 U.S. at 419).

In writing the plurality opinion in Lafayette, Justice Brennan conceded that local governments generally act to benefit their citizens. Nevertheless, he pointed out that economic choices made by local governments to benefit its citizens "are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of . . . its shareholders." (435 U.S. at 403)

To illustrate his point, Justice Brennan pointed to the allegations in the power company's counterclaim in Lafayette that the cities were using their market power over water and gas service to coerce customers of the utility into buying electricity from the city. Justice Brennan found the effects of such a tie-in to be twofold. First, the tie-in would have the potential of increasing the cost of electricity to the consumer, because it assured the cities of a captive customer base and thus dispensed with the need to price electricity to meet competition. As a consequence, electric customers would not be basing their purchasing decisions on which producer was the most efficient. Second, the tie-in would have an adverse effect on the electric utility and its other customers. Consequently, Justice

Brennan and a plurality of the Court concluded that the temptation on the part of local governments to base their decisions affecting competition on the interest of realizing maximum benefits to the local government and its citizens without regard to regional or statewide efficiency was too great.

Another argument for blanket immunity, that the welfare of all those who may be adversely affected by anticompetitive ordinances or practices of a local government will be protected by the political process, is in Justice Brennan's words "without merit." (435 U.S. at 406) He noted that the antitrust laws were enacted by Congress to insure free and open competition in the market place and that this fundamental national policy should not be left to the vagaries of the political process. He went on to say that "[i]f municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established." (435 U.S. at 408) Indeed, Affiliated Capital Corp. v. City of Houston, 700 F.2d 226 (1983), illustrates that the "parochial" interests underlying local governmental regulation may be more political than economic. City of Houston is a classic example of a case in which the local government proved incapable of dealing with the economic issues raised by cable television franchising because of political pressures. In that case, city officials were engaged in influence peddling and other forms of political corruption.

Finally, we disagree with the argument that some have raised that application of the antitrust laws to local government interferes with normal governmental functions. In the wake of Lafayette, local governments continued to function effectively and efficiently and to grant franchises, provide monopoly services and deny zoning variances. This has been done without becoming entangled in the seamless web of antitrust by taking the same precautions that every private business, both large and small, has to take. Before taking an action which might have the effect of limiting or restricting commerce, one must first determine whether one is on sound legal ground. For local governments, this simply means a determination of whether the conduct in question is authorized or sanctioned by the state.

With each judicial decision local governments are given more guidance on the subject. As Virginia Attorney General Gerald Baliles stated when speaking on behalf of the National Association of Attorneys General before the Committee:

> Four Federal Circuit Courts of Appeal have now considered the standards for judging anticompetitive activity of local governments. The results have been consistent among the circuits and with prior Supreme Court decisions. The National Association of Attorneys General believes these recent opinions do give guidance to local governments, and provide a more acceptable framework.

Moreover, the Lafayette decision has not hamstrung the ability of states to delegate its powers to local governments. Indeed, the record is quite to the contrary as evidenced by the fact that in Boulder twenty-three states joined in an amicus brief opposing the City's contention that it should be cloaked with immunity.

Just as the Lafayette decision did not produce a parade of horribles in the four years between that decision and the Boulder decision in 1982, the past two years since Boulder have similarly not produced the dire results that some have predicted. As in the Lafayette decision, the dissent in Boulder predicted that the majority's decision would paralyze local governments' efforts to enact ordinances and regulations aimed at protecting public health, safety and welfare. Since Boulder merely decided that home rule localities are no different than other local governments for purposes of state action immunity, it is fair to ask how the dissent could make such a prediction in light of the four years of history that transpired between Lafayette and Boulder -- a history in which local governments functioned efficiently and effectively. In his concurring opinion in Boulder, Justice Stevens appears to agree that local governments will not be paralyzed since he observed that the dissent's "dire predictions . . . should . . . be viewed with skepticism." (455 U.S. at 58)

When examining the effects of Lafayette on municipalities, statistics speak louder than words. Today, there are approximately 70,000 local governments in the United States. Since Lafayette, 96 reported antitrust cases have been decided involving municipalities. This is hardly the flood of litigation predicted by the dissent in Lafayette. Of those 96 cases, only eight have resulted in judgments against the cities.

In short, the feared paralysis of local governments predicted in 1978 has not occurred, and it will not occur now. Nor have cities been foreclosed or inhibited by litigation from performing their normal and essential functions. Many antitrust cases involve only injunctive relief. Some cases readily can be handled on a summary basis because they do not make out an antitrust claim. Many cases are resolved by the simple act of opening up contracting procedures to competitive bidding. Much conduct that reasonably restrains trade already is authorized by applicable state laws, and therefore is not subject to antitrust attack. The courts have shown the ability to apply the antitrust laws fairly. In those cases where antitrust violations have been proven, damages properly should be awarded to those injured by the conspiracy or unlawful restraints of trade.

More important than what appear to be groundless concerns raised by the proponents of this type of legislation is the undeniable fact that granting local governments carte blanche authority to pass ordinances that restrict competition without concern for whether the state government has spoken on the subject would undercut the fundamental principles of federalism that the states, not the subdivisions of states, enjoy sovereignty under our Constitution. In Boulder, for example, Justice Brennan made clear that sovereign authority within this country resides in either the federal government or the state governments, not in local governments. Consequently, it is erroneous to say that local governments can legislate or otherwise set policies as if they were the alter egos of the state. Under our dual system of government, all authority of local governments must be derived from the state. As pointed out above, existing law permits states, if they so desire, to delegate to their municipalities this authority, including antitrust immunity in regard to a specific subject area. It would be a mistake for Congress to generally delegate this immunity without consideration of specific state policies and procedures.

In summary, there appear to be several lessons to be learned from the policies underlying Lafayette and Boulder when considering legislation like S. 1578. First, under our system of government all authority must flow from one of two sources, either the Federal government or the state governments. To permit local governments to regulate or restrict competition without regard to the policy of the state from which the locality derives its authority would be inconsistent with our basic principles of federalism. Second, local governments are likely to act to further their own parochial interests rather than out of concern for either regional or state policies. Consequently, for local governments to be given the authority to regulate, control and even restrain trade and commerce would eviscerate the national policy of promoting free and open competition which underlies our antitrust laws. Third, it is naive to assume that those who are adversely affected by the actions of local governments have meaningful recourse through the political system.

In summary, it does not appear that local governments have suffered the dire consequences proponents of this legislation suggest. Therefore, we urge the Committee not to consider favorably legislation that will overturn two Supreme Court decisions that were obviously subject to careful and deliberate consideration. One can only imagine the result if the approximately 70,000 local governments in this country were notified tomorrow that they could enact any ordinance they choose, regardless of the policy's impact on free and open competition.

As to the specifics of S. 1578, we believe this bill has some basic deficiencies. First, it places the cities on the same basis as states for purposes of the antitrust laws, purporting to create a "city-action" immunity, which would place diffuse antitrust policy-making power in thousands of local government units and, second, it bases application of the exemption on an arbitrary exclusion for certain sales of goods and services. The bill provides in pertinent part:

> Sec. 2. The Federal antitrust laws shall not apply to any law or other action of, or official action directed by, a city . . . or other general function unit of local government in the exercise of its regulatory powers . . . , but excluding any activity involving the sale of goods and services by the unit of local government in competition with private persons . . . (Emphasis added).

By its terms, the exclusionary clause appears to make the antitrust laws applicable only to a "sale of goods or services by the unit of local government" (emphasis added). Thus, local governments of various types might endeavor to avoid any effect of this statute by delegating or contracting for the management of whatever proprietary activity they desire. Waste management facilities, for example, are operated typically on a contract basis. Many activities from which governmental units receive non-tax revenues involve rental of government property to private operators. Any activity currently operated as a division of a local government entity easily could be transferred to a contract operation. In short, this clause places form over substance and may result in an extremely narrow or non-existent application of the antitrust laws to proprietary activities by local government units.

In any case, application of the antitrust laws would depend on a case-by-case judicial struggle with an artificial test. For example, cable television franchise cases apparently would turn on the clauses in contracts and ordinances. The same behavior would be legal government regulation or illegal antitrust conspiracy depending on how good a draftsman the City Attorney happened to be.

Furthermore, the language of this clause will result in litigation of issues which will be undesirable as a matter of antitrust policy. The decision whether a government activity is "in competition" with private persons asks for the kind of full-blown inquiry that has caused some antitrust litigation to become a kind of trial by ordeal in which both sides hire expensive expert economist witnesses and plunge into massive discovery to determine whether the entities, in fact, are "in competition." Likewise, the undefined terms "sale," "goods" and "services" will lead to litigation. In short, this bill will inevitably lead courts into the "quagmire" of artificial distinctions between governmental and non-governmental functions, which was warned against by Mr. Justice Frankfurter in Indian Towing Co. v. United States, 350 U.S. 61 (1955).

As this statement indicates, it is our belief that no legislation to overturn Boulder is necessary at this time. However, if legislation providing local governments, their subdivisions and agencies with immunity from the antitrust laws when they perform or engage in governmental activities or conduct is considered, it must be more carefully crafted. To prevent abuses similar to those alleged in Lafayette and similar cases still pending, the legislation should clearly ensure that such governmental units, in the performance of proprietary activities, remain subject to the antitrust laws to the same extent as non-governmental entities performing or engaging in like activities or conduct.

As the Committee is certainly aware, while this may not be unduly difficult to articulate, it may be somewhat more difficult to draft statutory language to effect an adequate governmental/proprietary distinction in such a manner as to avoid further definition through litigation. In further considering S. 1578 or similar legislation, however, attention must be focussed at a minimum on the ability of local governments to delegate proprietary activities, the fact that such activities may involve more than the sale of goods and services, and the problem of potential as well as already-existing competition.

We appreciate the opportunity to present our views on this bill.

JOSEPH T. CONAWAY
COUNTY ADMINISTRATOR

Sussex County
COURTHOUSE
GEORGETOWN, DELAWARE 19947
302 856-7702

3/267
Committee

1984 MAR 26 PM 2:18

March 27, 1984

The Honorable William V. Roth, Jr.
United States Senator
3215 Dirksen Senate Office Building
Washington, D. C.   20510

Dear Senator Roth:

I am enclosing a "FACTSHEET" provided to Sussex County by the National Association of Counties. An examination of this sheet, dealing with County liability under federal antitrust laws, will make it very clear as to our concerns. If something is not done to relieve this situation, the Sussex County Council could legally be coerced into approving all zoning decisions, regardless of the appropriateness of the application. The threat of a massive judgment in which trebled damages are available to those who would sue the County would be sufficient grounds to force the County into compliance with unfair and unreasonable demands by developers who seek profit as their only motive for action.

The Sussex County Council supports NACo's position and asks for legislation which:

(1) exempts counties from antitrust statutes with immunity equal to that enjoyed by the states;

(2) provides immunity for all actions, governmental and proprietary, so long as the county government is acting within state law;

(3) limits damages for those few activities which would remain liable.

We ask your support in this vital issue. If we can be of any service, don't hesitate to call upon us.

Yours truly,

Joseph T. Conaway
County Administrator

JTC/sww

NATIONAL
ASSOCIATION
of
COUNTIES

440 First St. NW, Washington, DC 20001
202/393-6226

FACTSHEET

Contact: Linda Church Ciocci

Matthew B. Coffey, Executive Director

COUNTY LIABILITY UNDER FEDERAL ANTI-TRUST LAWS

Issue

County government and their officials are subject to suit under federal anti-trust laws when their actions displace competition in regulating the private sector. Recently, a private developer received a $28.5 million judgment against Lake County, Illinois, the Village of Grayslake, along with several local elected officials over a dispute involving the extension of sewer lines. Anti-trust laws provide for the recovery of treble damages. These judgments can be awesome. To date, hundreds of suits have been filed. Primarily, these suits challenges counties' local land use and zoning decisions, actions effecting development, and decisions involving franchise awards.

Action Requested

In pursuing a federal statutory remedy, NACo has maintained that Congress never intended local governments to come under the purview of the anti-trust statutes and that it is more appropriate for Congress to clarify its interpretation of its own laws. We believe there are numerous laws which can be used in cases where an official or a government has acted improperly. Anti-trust law should not be applied. Contact your Congressmen and Senators. Tell them to support hearings in the House and Senate Judiciary Committees. Seek their support for legislation which provides immunity for counties and their officials when they are acting within state law. Tell them that NACo supports legislation which:

1) exempts counties from anti-trust statutes with immunity equal to that enjoyed by the states;

2) provides immunity for all actions, governmental and proprietary, so long as the county government is acting within state law;

3) limits damages for those few activities which would remain liable.

Some members may suggest they prefer state action, and would support only a national measure that sets guidelines for the states to act. This does not provide adequate protection. Anti-trust statutes are federal law and require a congressional clarification. In addition, there is no way Congress can ensure state immunity action or the extent of that immunity. State protection could take years after the enactment of federal guidelines which leaves counties' officials subject to suit for all actions up to the time of state law enactment. Most importantly, there is some question as to whether state legislation would be found acceptable in federal court.

Background

In 1982 in a landmark decision, Community Communications v. Boulder, the United States Supreme Court held that a local government -- even one with broad home rule powers -- was not immune from federal anti-trust actions when it attempted to regulate the private sector. In order to be immune a city or a county was required to establish that it was acting pursuant to an expressed state policy which directed or authorized the jurisdiction to displace free competition. In addition, for immunity to be conferred, the state had to also actively supervise the conduct in question.

Prior to Boulder, most legal experts thought local governments enjoyed the same immunity granted to the states under the so-called anti-trust exemption or immunity outlined in Parker v. Brown in 1943 so long as they were performing a "governmental" function. In effect, any local government could be sued under the federal anti-trust statues -- even a home rule government -- thus negating the whole concept of home rule.

Associate Justice William H. Rehnquist filed a dissenting opinion in the Boulder case that was joined by Chief Justice Warren E. Burger and Associate Justice Sandra Day O'Connor. They said the decision would "impede, if not paralyze, local governments' efforts to enact ordinances and regulations aimed at protecting public health, safety and welfare, for fear of subjecting the local government to liability under the Sherman Act."

Status

The Senate Judiciary Committee expects to hold hearings within the next four weeks. The House Judiciary Committee postponed hearings last fall, and will be rescheduling these hearings shortly. In addition, the Senate Subcommittee on Intergovernmental Relations is also expected to schedule a hearing.

There are several measures already introduced in Congress. These bills provide protection in varying degrees. Of all the measures, the best bill from NACo's perspective is H.R. 3361, a bill sponsored by Representative Hamilton Fish (R-NY). His bill limits the liability of local governments, so long as they are acting within their governmental authority. In those instances where the county would remain liable, Fish's legislation prevents the recovery of treble damages.

Another measure is S. 1578, introduced by Senator Strom Thurmond (R-SC) and Chairman of the Senate Judiciary Committee. His bill applies only to general purpose governments, and provides protection only under the county's regulatory powers. His bill would not cover any action which involves "the sale of goods or services." (Thus, counties could remain subject to suit in such areas as water and wastewater treatment or drugs sold by a county hospital.)

Representative Henry Hyde (R-IL) has introduced H.R. 2981. This measure is similar to the Fish bill, but it does not prevent the recovery of treble damages.

Finally, Representative Don Edwards (D-CO) has introduced H.R. 3688. The measure limits the liability of general purpose governments only under governmental activities and leaves public officials exposed to liability under the anti-trust laws. It does not limit treble damages.

The Judiciary Committees in both houses has jurisdiction over anti-trust matters. Members of the House and Senate Judiciary Committees follows:

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George W. Gekas, Pa.
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JUDICIARY COMMITTEE
1984 JUN 12 AM 9 08

National Association of Home Builders
15th and M Street, N.W., Washington, D.C. 20005
Telex 89-2600 (202) 822-0400 (800) 368-5242

Peter D. Herder
1984 President

June 7, 1984

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
SD-224 Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

On behalf of the more than 124.000 members of NAHB, I am pleased to submit this statement in opposition to S. 1578, broad legislation immunizing decisions by local governments from the effect of the antitrust laws. NAHB is a trade association which represents this nation's homebuilding industry, of which I am President.

I would like to respectfully request that this statement be included in the Subcommittee hearing record on the subject of local government antitrust liability.

Mr. Chairman, our major concern is the availability of a remedy to deal with illegal governmental actions that affect local land use and zoning decisions. We recognize that use of an antitrust remedy against local governments will be very limited and that proof of such a violation is very difficult. However, we believe that the availability of such a remedy will serve as a deterrent to unwise land use and planning decisions and litigation will be a last resort reserved for the most serious cases.

We believe that the 1982 Supreme Court decision in Community Communications Company v City of Boulder, was a logical and reasonable interpretation of the antitrust laws. The plaintiff still has the significant burden of proving the anti-competitive actions of local governments and the presumption of validity is strongly in favor of local governments. The court specifically held that local governments are not eligible for the "state action" exemption granted to the states themselves. The 1943 Supreme Court decision of Parker v. Brown, which first espoused the "state action doctrine", had been widely interpreted as applying to municipalities and counties, as well as to the states.

An earlier decision gave the first clear signal to local governments that the state action doctrine as it applied to local governments had been eroded. In Lafayette v. Louisiana Power and Light Company, the Supreme Court for the first time defined "persons" under the federal antitrust statutes to include municipalities including all local governments, and commented:

> "cities [and counties] are not themselves sovereign; they do not receive all the federal deference of the states that create them"

Thus, local governments were not automatically exempt from antitrust liability, but were only considered to have "state action immunity" as described by Parker when they acted "pursuant to state policy to displace competition with regulation or monopoly public service."

The issue at hand does not concern legitimate local governmental functions, but whether absolute immunity should be given to protect the most egregious type of conduct by municipal officials.

Antitrust laws allow injured parties to sue when they are financially damaged by the anti-competitive actions of a competitor. Sometimes, however, local government becomes that "competitor" through regulatory activities that effectively advance the interests of one private concern over those of another private concern.

The primary area of interest to NAHB involves zoning and other land use actions at the local level. Land use decisions inevitably result in some interference with the free market and with competitive opportunities to use land. Many local jurisdictions grant a rezoning application to one applicant while denying it to another, even adjacent, landowner. In rare instances, governmental actions may have the effect of promoting one developer over another, ultimately triggering a potential violation of federal antitrust laws.

Some developers have sought to use federal antitrust laws to deal with municipal conduct that restricts competition. The deterrent effect of having antitrust laws applicable to local governments would make those governments responsible for their land use and planning decisions, thus actually reducing the threat of antitrust law suits. Furthermore, the treble damages remedy available under the federal antitrust laws heightens the accountability of local governments and the credibility of their decision making process.

Maryland, Illinois, and North Dakota are the only states thus far to take action aimed at limiting the exposure of its local governmental bodies to liability under the federal antitrust laws. Other states have considered but rejected similar measures.

In January, 1984 the NAHB Board of Directors went on record opposing all legislative proposals that would automatically protect local governments from antitrust suits brought by private business, and legislation which would prevent state governments from considering the issue.

We are dealing with one federal government, fifty states, and over 75,000 local governments. Federal antitrust laws have protected the federal and state governments. NAHB questions the wisdom of expanding the antitrust exemption umbrella to at least an additional 75,000 local governments. We do not oppose discussion of this issue at the state level. The Supreme Court clearly ruled that local governments are not protected by Federal antitrust laws unless specifically granted immunity by their state governments. Congress has previously elected to protect their political subdivisions (states) and should not interfere in the relationship between states and their political subdivisions (local governments).

The local government antitrust liability question deals with the fundamental relationship between states and their subdivisions. This relationship varies from state to state according to state law. Broad federal action to regulate this relationship may be well intended, but we do not believe that it is either a necessary or desirable way to deal with this issue.

We appreciate the opportunity to present our views on this important issue.

Sincerely,

Peter D. Herder

Peter D. Herder

STATEMENT ON
LOCAL GOVERNMENT ANTITRUST POLICY

SUBMITTED BY
DICK HEMSTAD

ON BEHALF OF
THE NATIONAL CONFERENCE OF STATE LEGISLATURES

THANK YOU FOR THIS OPPORTUNITY TO SUBMIT A STATEMENT ON THE MUNICIPAL ANTITRUST ISSUE.

THIS STATEMENT IS SUBMITTED ON BEHALF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES. NCSL IS THE OFFICIAL REPRESENTATIVE OF THE COUNTRY'S 7,438 STATE LAWMAKERS IN THE 50 STATES AND IN THE AMERICAN TERRITORIES AND COMMONWEALTHS.

NCSL BELIEVES IN THE NEED FOR BALANCING COMPETING INTERESTS IN FINDING A SOLUTION TO THE MUNICIPAL ANTITRUST PROBLEM. ON THE ONE HAND, FEDERAL LEGISLATION IS NECESSARY TO CLARIFY THE RESPONSIBILITIES OF LOCAL OFFICIALS UNDER THE ANTITRUST LAWS. THE CURRENT UNCERTAINTY REGARDING MUNICIPAL ANTITRUST STANDARDS MAY PROMPT UNNECESSARY LAWSUITS OR MAY RESULT IN SUBSTANTIAL LIABILITY FOR LOCAL OFFICIALS ACTING IN GOOD FAITH. ON THE OTHER HAND, FEDERAL LEGISLATION SHOULD BE LIMITED IN RECOGNITION OF THE CONSTITUTIONAL RESPONSIBILITY OF THE STATES TO DEFINE THE DEGREE OF AUTONOMY ENJOYED BY THEIR LOCAL GOVERNMENTS.

THESE COMPETING INTERESTS CAN BE BALANCED BY PASSING FEDERAL LEGISLATION THAT PROVIDES LOCAL GOVERNMENT IMMUNITY WHENEVER STATE LEGISLATION CONTEMPLATES THAT THE FEDERAL ANTITRUST LAW SHOULD BE DISPLACED--EVEN IF SUCH STATE LEGISLATION DELEGATES RESPONSIBILITY TO LOCALITIES IN RELATIVELY BROAD CATEGORICAL AREAS. UNDER SUCH A STANDARD, MUNICIPALITIES AND COUNTIES WOULD NOT BE REQUIRED TO REQUEST STATE LEGISLATIVE AUTHORIZATION FOR EVERY INSTANCE OF ACTIVITY HAVING ANTICOMPETITIVE ASPECTS. SUCH A STANDARD WOULD NOT REQUIRE ACTIVE STATE SUPERVISION NOR WOULD IT REQUIRE THAT STATE LEGISLATION PROVIDING IMMUNITY MUST BE SO SPECIFIC AS TO, IN EFFECT, COMPEL THE LOCAL ACTIVITY. THIS DOES NOT MEAN A BROAD HOME RULE STATUTE WOULD PER SE GUARANTEE IMMUNITY. SOME SUBJECT-AREA

DEFINITION OF THE GRANT OF ANTITRUST IMMUNITY APPEARS NECESSARY IF STATE LAW CAN TRULY BE SAID TO CONTEMPLATE THE DISPLACEMENT OF FEDERAL ANTITRUST LAW.

SUCH LIMITED FEDERAL LEGISLATION PROVIDING GUIDELINES FOR THE IMMUNIZATION OF LOCAL GOVERNMENTS FROM ANTITRUST LIABILITY WOULD SERVE TO FACILITATE THE DELEGATION OF ANTITRUST IMMUNITY TO LOCAL GOVERNMENTS WHILE RECOGNIZING TRADITIONAL STATE RESPONSIBILITIES RESPECTING LOCAL GOVERNMENTS. SUCH LEGISLATION WOULD RECOGNIZE THAT LOCAL GOVERNMENTS ARE NOT A THIRD SOVEREIGN FORM OF GOVERNMENT. UNDER OUR SYSTEM OF DUAL SOVEREIGNTY, LOCAL GOVERNMENTS EXIST AS CREATURES OF THE STATE. IN THIS IMPORTANT POLICY AREA, LOCALITIES SHOULD NOT, THEREFORE, DEPEND ON A SWEEPING AND DIRECT GRANT OF ANTITRUST IMMUNITY FROM THE FEDERAL GOVERNMENT THAT WOULD HAVE THE EFFECT OF DISRUPTING THE TRADITIONAL RELATIONSHIP OF STATES TO THEIR LOCAL SUBDIVISIONS.

SUCH LIMITED FEDERAL LEGISLATION, AT THE SAME TIME, WOULD CLARIFY THE RESPONSIBILITIES OF LOCAL GOVERNMENTS UNDER THE FEDERAL ANTITRUST LAWS. THE REQUIREMENT OF BOULDER AND RELATED SUPREME COURT DECISIONS THAT LOCAL GOVERNMENT IMMUNITY MUST BE BASED ON A "CLEARLY ARTICULATED AND AFFIRMATIVELY EXPRESSED STATE POLICY" IS UNCERTAIN AND POTENTIALLY INFLEXIBLE. SOME PEOPLE EVEN FEAR THE REQUIREMENT MIGHT BE CONSTRUED TO PROVIDE LOCAL GOVERNMENT ANTITRUST IMMUNITY ONLY WHERE STATE SUPERVISION IS ACTIVE OR WHERE THE DELEGATION OF STATE AUTHORITY IS EXTREMELY NARROW AND DETAILED. THE FEDERAL LEGISLATION THAT NCSL HAS RECOMMENDED WOULD PUT TO REST FEARS OF SUCH WORST-CASE CONSTRUCTIONS.

FEDERAL LEGISLATION WOULD NOT, OF COURSE, REDUCE ALL UNCERTAINTY REGARDING THE STANDARDS OF MUNICIPAL ANTITRUST LIABILITY. NO LEGAL STANDARD IS COMPLETELY COMPREHENSIBLE UNTIL LITIGATED AND APPLIED IN SPECIFIC FACT SITUATIONS. BUT, FEDERAL LEGISLATION CAN MAKE THE STANDARDS OF LOCAL GOVERNMENT ANTITRUST LIABILITY MORE CERTAIN AND THEREBY REDUCE THE INCENTIVE FOR LITIGATION AND REDUCE THE FEAR OF LIABILITY WHICH MAY INHIBIT LOCAL GOVERNMENT DECISION-MAKING.

ONCE FEDERAL LEGISLATION HAS DEFINED THE FORM OF STATE DELEGATION NECESSARY TO PROVIDE IMMUNITY, LOCALITIES NEED NOT FEEL UNDULY THREATENED BY LAWSUITS PROVIDED THEY ACT PROPERLY PURSUANT TO STATE LAW CONTEMPLATING THE DISPLACEMENT OF THE FEDERAL ANTITRUST LAWS.

"FOR THE COMMITTEE HEARINGS ON THE PROBLEMS OF ANTI-TRUST AND LOCAL GOVERNMENT".

FROM: MAYOR ARDEN D. ASHLEY, NITRO, WEST VIRGINIA

BY WAY OF INTRODUCTION:

Mayor Arden D. Ashley is a native of Nitro, West Virginia. He is a former account executive with Prudential Bache. He was a successful stockbroker and moderator/commentator of public television economic news program.

Mayor Ashley was elected for the first time to public office in 1980 and recently was successfully reelected for a second four year term.

As a local government official, he has been recognized by his peers as a leader. He is president of the Kanawha River Mayor's Association, a member of the Board of Directors and secretary of the West Virginia Municipal League, and was recently elected to the Board of Directors of the National League of Cities.

By way of further introduction, Nitro, West Virginia is a typical small community of 8,500 people in a state, that is by national standards, sparsely populated with a total resident population of approximately two million. The two largest cities in West Virginia are between sixty and seventy-five thousand in population.

While Nitro does have the services of a capable city attorney, his compensation is but a token of his value to the community. Most of West Virginia's two hundred thirty-one cities do not have a city attorney. Many have no insurance and unfortunately, many have no knowledge of the implications of the "Boulder" decision and the resulting changes in the interpretation of the anti trust laws as they relate to local government.

STATEMENT FROM MAYOR ARDEN D. ASHLEY

Mr. Chairman and members of the Senate Judiciary Committee, I humbly approach you as a duly elected representative of a small city in West Virginia with no qualifications in the field of law. You have heard from many experts on the legal ramifications of the case involving "Community Communications, Inc. vs. the City of Boulder," and from a legal standpoint there is nothing I can add to their statements. Instead, I would first approach you on the merits of that decision and then appeal to you for a specific solution.

I will attempt to cover the presumption of the original purpose of the law prior to the Boulder decision, to discuss some of the problems that the Boulder decision has caused for local governments, to compare some of the legal requirements with practical facts, and finally appeal for a solution through a Federal Legislation.

I am informed that there is an understandable skepticism on the part of Congress when there is a request for relief that accompanies an appeal for new laws. I am certain that this is no less the case as I appeal to you for relief from the restraints that have been placed on local government by the Supreme Court determination in the Boulder case. However, I consider it part of my duty as an elected official to try to persuade you, the Congress, that the very foundation of local government as been challenged by the Boulder decision and the solution is within your grasp.

THE ORIGINAL PURPOSE

The opinion appears almost universal that when Congress enacted the Sherman Act over 90 years ago, it was intended that local, state and federal governments were to have immunity from anti-trust litigation. That system has been in effect and it has worked well for almost a century.

As James V. Siena stated before the National League of Cities, "There is precious little evidence that local governments have abused their de facto anti-trust immunity in any meaningful way at all. There is no evidence that local government officials are more prone to succumb to anti competitive urges or blandishments than their state and federal counterparts."

Clearly, the Boulder decicion has caused a fundamental change in anti-trust laws, and until that decision there was never a cause to believe that states and local governments would be treated in such a manner. Essentially, the City of Boulder had sought to regulate its existing cable television franchisee by imposing a 90 day moratorium on further cable television construction, while the city requested bids for additional television franchises. The district court preliminarily enjoined enforcement of that moratorium ordinance on the ground that it violated the Sherman Act. The Tenth Circuit Court of Appeals reversed that decision holding that Boulder Home Rule qualified for the City of Boulder for immunity. Then, on January 13, 1982 the United States Supreme Court reversed the Tenth Circuit Court of Appeals decision, five to three. In reaching that decision, the Supreme Court crushed the foundation of that element of government closest to the people in this country and forced local governments to respond in ways that are not in the best interests of their communities, the people they represent, or even the state governments and federal government itself. The structure has been weakened, the system has changed and the solution rests with new legislation that will give local government the immunity it needs to serve its people.

SOME OF THE PROBLEMS

The greatest problem facing local governments today as a result of the Boulder decision is the uncertainty within which they must operate. Not only the uncertainty as to what the final outcome might be, but also the uncertainty that arises from the complexity of the laws in question. By and large, it would be foolhardy of any responsible person to expect that the state legislatures will come to the aid and rescue of local governments. That is not the way the system works between local and state governments just as it is not the way the system works between the federal and state governments. Even if it should work, we have found that "Home Rule" provides no protection.

So, while we must wait for the dust to settle on the confusion centered around changes in the law and decisions being handed down, local governments are exposed to an enormous volume of anti-trust letigation which goes well beyond the bounds of their ability to survive. It is not at all necessary that the city lose a case in order to lose its charter. Anti-trust lawyers are less than timid about their fees, the systems is typically one of long duration and the cost of anti-trust litigation is just well beyond the means of most cities in West Virginia to even contemplate. It is not uncommon for cities to be involved in litigation concerning anti-trust into the hundreds of millions of dollars. The annual budget for the City of Nitro is less than two million. This wouldn't even enable us to defend ourselves in a significant case involving the question of anti-trust. As a result, the smarter local officals are attempting to posture themselves in such a way that they will not be subject to litigation and the only effective way of doing this is to not only become well acquainted with the laws, but also not to agressively pursue questions that are perhaps otherwise in the best interest of the community.

It should also be mentioned, that the liability and hazards placed upon public officials, just because of their willingness to serve, is of paramount concern to those individuals who hold the office and are aware of the liabilities. It would be my personal guess that the vast majority of people who are available and capable of public service are more and more reluctant to do so because of the inherent risk of potentially damaging litigation. While it would not be my intent to structure a law that would protect people who would willfully or knowingly conduct themselves in a way to bring discredit to their community, we must not forget who the losers are in the event that an elected official should be subjected to anti-trust litigation with the result of losing a case. The real losers would be the people of that community. They would be the ones who would be required to pay the bills and if the city couldn't afford the cost, it could very well mean that the Charter would be lost as well. What happens then to the people? What happens then to the government?

LEGAL VS. PRACTICAL FACTS

This brings us to the pondering of the question, who are the people elected to serve? I would submit to you that the typical mayor of the cities of West Virginia do not come to office prepared to deal with the anit-trust lawyers who would relish an opportunity to bring them into the courtroom.

The anti-trust laws are so complex that it represents a special field, brand new to municipal government. The Boulder decision reveals the court failing to take in account the realities of modern government. In recent years the citizens throughout this land are demanding more and more from our cities and regional governments and additional responsibilities have been assumed at the local level. Even the approach under the new Federalism program by President Reagan returns many of the responsibilites for service to the local governments where it's closest to the people.

And where might the litigation of the future originate? Former Attorney General of the United States, Benjamin Civiletti, has predicted that there will be "an explosion of new anti-trust litigation", and it would appear that his assessment is correct. It is anticipated that there will be a growing number of cases that are both "real" and "unreal". Every section of the zoning ordinances of every city in every state is now subject to the scrutiny of the lawyers looking for a case to promote. Every developer is a potential opponent in the courtroom for the cities if personal and private preferences are not met. Clearly, the most advantageous position of a litigant opposing a municipality, is to deal with them through negotiations under the threat of litigation. In our small city, we have been sued, and we have settled, in spite of the belief that we were on the right side of a case, only because the cost of litigation exceeded the cost of an out-of-court settlement. If that can be done for a few thousand dollars on a minor scale, what pressure might be brought to bear to settle an anti-trust case out of court where the cost of defense exceeds the annual budget? As has been stated, with the potential for treble damages and attorney fees being added to the judgement, anti-trust suits are especially attractive when a public official (who is there for as long as the public prefers him) is vulnerable because of an upcoming election.

Clearly, the Boulder decision has created political problems. Now, Cities must act in ways that are sometimes contrary to the expressed wishes and best interest of their communities. There has been a modification of established city practices, and many of these are not good.

THE SOLUTION

Again, I quote from James V. Siena in addressing the National League of Cities when he said "Congress should give local governments the same standing under the anti-trust laws as is given state governments. The actions of local government should be free from anti-trust scrutiny if they're taken pursuant to clearly articulated and affirmatively expressed local policy to replace competition with regulation or monopoly and if the supervision of these policies is given over to local government officials rather than to private interests. Needless to say, the immunity would attach only if the local government is acting within the ambit of powers available to it under its particular relationship with the state. But so long as that test is satisfied, the immunity that belongs to the state and the exercise of its power, should also belong to the local government. This is a modest proposal."

To those who would suggest that state legislative action be taken, I would only submit that it would appear that, absent federal action, any action taken at the state level at this point and time would be meaningless. I would further encourage the adoption of the approach that Benjamin Civilette took when he suggested "A law granting Parker-Type immunity would provide a uniform rule throughtout the country, and would avoid the piece meal approach of litigation".

CONCLUSION

The court's ruling in the Boulder case clearly shocks the system of local government. It appears to violate the original intent, and earlier interpretation of the laws handed down through generations. However, now what we thought was the original intent, (even with amendments) is no longer valid. We are left with a system that cannot work as it once did and while the officials of local government can make the change, the system cannot provide the same services that have been fundamental to the principals of government in this country. That's the law now, and we must abide by it.

Speaking as a member of that body of local government we are doing all we can while we wait for the change that's needed.

As you think of the Boulder decision, consider it an illness rather than a traumatic injury. Treat it as an insidious cancer that can eat at the fiber of that vital element of our society, the local government. We look to you for the cure.

Arden D. Ashley